

Court File No.: CV-22-00030791-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

AUTOMOTIVE PARTS MANUFACTURERS' ASSOCIATION

Plaintiff/
Moving Party

- and -

JIM BOAK, JOANNE CALLAWAY, HILDA FISHER,
LORI INVERARITY, LEO LUCIO, GIL PONTE, MANBAE SINGH-GALL
DARLENE THOMPSON and JOHN DOE

Defendants/
Responding Parties

- and -

THE CORPORATION OF THE CITY OF WINDSOR,
ATTORNEY GENERAL FOR ONTARIO

Intervening Parties

-and-

THE DEMOCRACY FUND

Intervenor/
Friend of the Court

**SUPPLEMENTAL BOOK OF AUTHORITIES
OF THE INTERVENOR, THE CORPORATION OF THE CITY OF WINDSOR**

February 17, 2022

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CITATION: AUTOMOTIVE PARTS MANUFACTURERS' ASSOCIATION v. JIM BOAK,
2022 ONSC 1001

COURT FILE NO.: CV-22-00030791-0000

DATE: 2022-02-14

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: AUTOMOTIVE PARTS MANUFACTURERS' ASSOCIATION

AND:

JIM BOAK, JOANNE CALLAWAY, HILDA FISHER, LORI INVERARITY,
LEO LUCIO, GIL PONTE, MANBAE SINGH-GALL, DARLENE THOMPSON
and JOHN DOE

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Michael A. Wills and Darwin E. Harasym*, for the Plaintiff

Jennifer King, Michael Finley and Bevin Shores, for the Intervenor, the Corporation
of the City of Windsor

Joshua Hunter and Padraic Ryan, for the Intervenor, the Attorney General of
Ontario

Alan Honner and Daniel Santoro, for The Democracy Fund

Antoine d'Ailly and James Kitchen, for Citizens for Freedom

Kristian Langenfeld, Self-Represented

Lyall Tryst, Self-Represented

HEARD and DETERMINED: February 11, 2022

REASONS RELEASED: February 14, 2022

ENDORSEMENT

[1] At the conclusion of the hearing of this motion on February 11, 2022, I released the following endorsement:

[1] I am satisfied that the test for an interim interlocutory injunction has been met such that an injunction is granted, effective February 11, 2022 at 7:00 p.m., pursuant to s. 101 of the *Courts of Justice Act*, Rule 40.01 of the *Rules of Civil Procedure* and s. 440 of the *Municipal Act, 2001*.

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[2] An order to give effect to the foregoing is being prepared for my review and signature. Detailed reasons will follow.

[2] These are the reasons.

[3] Commencing on February 7, 2022, a protest has obstructed the intersection of Huron Church Road and College Avenue leading to the Ambassador Bridge (the “Bridge”) in Windsor, Ontario. The Protesters have parked multiple vehicles on city streets, blocking traffic from crossing the Bridge through the primary entrance. Since approximately February 9, 2022, Protesters have also blocked the secondary Bridge entrance located on Wyandotte Street West. The Protest is said to be “in solidarity with similar protests in Ottawa” and relates to COVID-19 restrictions.

[4] The Plaintiff, the Automotive Parts Manufacturers’ Association (“APMA”), supported by the Intervenor, the Corporation of the City of Windsor (the “City”) and the Attorney General of Ontario (“Attorney General”) bring this motion for an interim interlocutory injunction pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and/or a statutory injunction under s. 440 of the *Municipal Act, 2001*, S.O. 2001, c. 25 to restrain and enjoin the Defendants and any person having notice of the Order from impeding or blocking access to and from the Bridge.

[5] This motion was originally returnable on February 10, 2022, on a without notice basis. I adjourned the matter until 12 noon on February 11, 2022 so that the matter could be brought to the attention of the Defendants.

[6] I directed the Plaintiff and the City to issue a press release, providing details with respect to the scheduled time of this motion and details enabling the Defendants to access this virtual court hearing. I am satisfied that there has been sufficient publicity such that this matter has been brought to the attention of the Defendants.

[7] The named Defendants did not attend the motion. Other interested parties made submissions in opposition to the motion, though they were not added as intervenors.

[8] The issue to be decided on this motion is as follows.

[9] Should an interim interlocutory injunction under s. 101 of the *Courts of Justice Act* and/or a statutory injunction under s. 440 of the *Municipal Act, 2001* be granted to prevent the Defendants and the other Protesters from impeding access to the Bridge?

[10] At the outset, it is necessary to set out what this proceeding is about and, perhaps more importantly, what this proceeding is not about.

[11] This proceeding concerns a request for immediate injunctive relief to restrain the Defendants from establishing a blockade, or in any way impeding access both to and from the Bridge.

[12] This proceeding does not concern the actions of the Federal Government or the Ontario Government with respect to COVID-19 restrictions. In addition, this proceeding does not concern any issue relating to the efficacy of any COVID-19 vaccine or the appropriateness of any COVID-19 mandate.

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[13] It is also necessary to state that Canada is a democratic society that is governed by the rule of law. The *Canadian Charter of Rights and Freedoms* sets out various rights and freedoms that all of us in Canada enjoy. It does not provide constitutional protection for illegal activity or conduct, nor are the rights and freedoms set out in the *Charter* absolute. The extent of an individual right or freedom has to be measured against its effect on other members of the community and *their* rights and freedoms.

[14] The APMA, the City and the Attorney General do not suggest that the Protesters have no right to protest or express their views. They argue that the Protesters' rights to freedom of expression, assembly and association do not include blocking or impeding one of the main critical economic arteries between Windsor and Detroit, causing significant economic harm to the automotive industry and a profound negative impact on Windsor and its community, schools, residents, students and businesses.

[15] In an urgent case, a motion may be made before the commencement of proceedings on the moving party's undertaking to commence the proceeding forthwith.

[16] I am satisfied that this is an urgent matter and the Plaintiff has provided such an undertaking.

Evidence

[17] The Plaintiff and the City have filed numerous affidavits.

[18] Mr. Flavio Volpe, President-elect of the APMA, states that the APMA is a national association representing original equipment manufacturer ("OEM") producers of parts, equipment, tools, supplies, technology and services for the worldwide automotive industry. Mr. Volpe states that as of 2020, the automotive sector accounted for \$16 billion worth of investment in Canada and provided 117,000 direct employment jobs and approximately 370,000 in indirect jobs. He also states that the Detroit-Windsor crossing represents the highest number of loaded truck containers crossings annually. He estimates that approximately \$100 million worth of parts cross the border every day between the United States and Canada. He estimates that the blockade is costing \$50 million per day and that this cost will be directly felt by Canadian/Ontario/Windsor companies and has already resulted in shutdowns and partial layoffs at companies that APMA represents. Mr. Volpe also states that the APMA represents 178 members and specifically represents 19 taxpayers directly in the City of Windsor, and in total 15 additional companies in the surrounding region. Mr. Volpe concludes by stating that the APMA undertakes to forthwith commence an action for damages against the Defendants and any other persons that may be subsequently identified.

[19] Mr. Brian Kingston, President and Chief Executive Officer of the Canadian Vehicle Manufacturers Association ("CVMA") also filed an affidavit. The CVMA represents automotive manufacturers with operations in Canada, including General Motors of Canada Co., Ford Motor Co. of Canada, Limited and Stellantis (FCA Canada, Inc.). Mr. Kingston states that CVMA members use the Bridge every day for vehicle and parts manufacturing operations. Mr. Kingston states that the current blockade has significantly disrupted, reduced and in some cases has stopped vehicle assembly operations at multiple assembly plants in Canada and the United States. Further, plants in Windsor and Oakville are currently running at reduced capacity because of parts shortages

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caused by the blockade. At Stellantis, shifts were negatively affected in both Brampton and Windsor. He states that the disruptions in plant shortages caused by the blockade at the Bridge have cost and continue to cost CVMA members immeasurable sums of money.

[20] Mr. Brayden Boughner, an articling student at McTague Law Firm LLP, lawyers for the Plaintiff, stated that he commenced a search for individuals who had been identified as participants in the Protest at the Bridge. He confirmed the following individuals to be participants: Manbae Singh-Gall, Leo Lucio, Lori Inverarity, Jim Boak, Darlene Thompson, Joanne Callaway, Hilda Fisher and Gil Ponte.

[21] Mr. Jason Reynar also swore an affidavit. Mr. Reynar is the Chief Administrative Officer of the City. Mr. Reynar states that by-law number 9148 is a by-law to regulate traffic within the limits of the City. Sections 7(1)(a) and 12 of this by-law provide as follows:

7(1)(a) No operator of the vehicle shall permit such vehicle to remain upon or be driven upon or along any street so as to block or obstruct traffic.

12. No person shall obstruct, encumber, injure or foul any highway or portion thereof.

[22] In a supplementary affidavit, Mr. Reynar comments on the impact of the Protest:

- (i) There are over 1,000 automotive manufacturers in the Windsor-Essex region representing more than \$4.5 billion in annual GDP (30% of regional GDP). The manufacturing sector employs some 36,800 people.
- (ii) These businesses rely on trans-border shipping across the Bridge.
- (iii) These businesses are part of the Windsor community and in addition to providing employment, they support charities and sponsor local events and activities.
- (iv) The Bridge serves as an important travel corridor for many Windsor residents.
- (v) Access routes to the Bridge pass through streets lined with small businesses as well as residential areas.
- (vi) In the immediate 2 km radius surrounding the blockade, there were 24,925 residents as of 2016. The campus of the University of Windsor is adjacent to Bridge Plaza and Huron Church Road. Two schools are less than 2 km from the Bridge and Hotel Dieu Grace Hospital is 3 km away.
- (vii) At the time he swore the affidavit, the Protest has blocked all Canada bound traffic and severely limited US bound traffic.

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- (viii) The Protest has resulted in business closures, layoffs and school closures and has impeded the City's ability to deliver crucial services, including fire and Emergency Medical Services.

[23] Mr. Jason Bellaire, Deputy Chief of the Windsor Police Service, states that from Monday, February 7, 2022 through to Thursday, February 10, 2022, he attended, as part of his official police duties, a public demonstration at the intersection of College Avenue and Huron Church Road in the City. This location forms the primary entrance and exit from the Bridge from Detroit (the "primary location").

[24] Deputy Chief Bellaire attended at this location and also reviewed the location remotely by live video footage on multiple occasions and observed numerous unknown and unnamed persons who he referred to as the "Protesters" and stationary vehicles occupy and block the primary entrance and exit from the Bridge. He states that the Protesters and vehicles parked on the roadways effectively formed a blockade of the primary entrance and exit of the Bridge. The blockade resulted in the complete closure of all Canada-bound vehicular traffic from the Bridge and severely limited U.S.-bound vehicular traffic on the Bridge to only the secondary Bridge entrance located on Wyandotte Street West in the City. Deputy Chief Bellaire went on to state that at some point during the evening hours of February 9, 2022 or the early hours of February 10, 2022, unnamed persons and vehicles intermittently blocked the secondary bridge entrance on Wyandotte Street (the "secondary location"). As of the time that he swore the affidavit on February 10, 2022, Deputy Chief Bellaire states that all access and exit to and from the Bridge had been obstructed by the Protesters.

[25] In addition, Deputy Chief Bellaire states that he and other Windsor Police Service officers have attended at both the primary and secondary location access points on multiple occasions from February 7, 2022 through to February 10, 2022 and asked the protesters blockading the Bridge entrances and exits to disperse to end the blockade of the highway and access to the Bridge. These efforts have been unsuccessful and the blockade was in effect at the time of his swearing of the affidavit.

[26] Deputy Chief Bellaire concludes by stating that the Protesters at both the primary and secondary locations are blocking a highway, namely the intersection of College Avenue and Huron Church Road, and Wyandotte Street West immediately adjacent to the Bridge and are thereby causing a disturbance by impeding members of the public and vehicular traffic to and from the Bridge. Deputy Chief Bellaire states that he believes that the actions of the protesters are contrary to provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, specifically ss. 175(1), 180(2), 430(1)(c)(d), and 423(1)(g).

[27] In response, The Democracy Fund filed the affidavit of Adam Blake-Gallipeau, who is a lawyer with The Democracy Fund. The mandate of The Democracy Fund includes protecting and preserving constitutional rights in Canada through public education and litigation. Mr. Blake-Gallipeau observed the secondary entrance to the Bridge on the morning of February 11, 2022 and stated that it is impeded by two or three motor vehicles.

[28] Further, during argument, I was asked to relax certain rules of evidence and to permit reference being made to the affidavit of Dr. Clifford Rosen, to which was attached a number of

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photographs purporting to have been taken on February 11, 2022 between 2:00 p.m. and 3:15 p.m. at the intersection of Huron Church Road and College Avenue.

[29] I then asked Ms. King, as an officer of the court, to see if she could provide assistance to the court in response to representations being made to the effect that there was no complete blockade. Ms. King made inquiries and reported that, save and except for allowing emergency vehicles to pass, the Protesters continued to block the primary location and the Wyandotte Street West location was only open intermittently.

Analysis

[30] In preparing these reasons, I have reviewed and considered the following cases: *Attorney General of Ontario v. Trinity Bible Chapel et al.*, 2021 ONSC 740; *Batty v. Toronto (City)*, 2011 ONSC 6862; *Caledon (Town) v. Darzi Holdings Ltd.*, 2019 ONSC 5255; *Canadian National Railway Company v. John Doe*, 2020 ONSC 3998; *Canadian National Railway Company v. Doe*, 2020 ONSC 4152; *Canadian National Railway Company v. Doe et al.*, 2013 ONSC 115; *Canadian National Railway Company v. Plain et al.*, 2012 ONSC 7356; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455; *Grand Financial Management Inc. v. Solemio Transportation Inc.*, 2016 ONCA 175; *Hamilton (City) v. Loucks* (2003), 232 D.L.R. (4th) 362 (Ont. S.C.); *MacMillan Bloedel Ltd. v. Simpson* (1994), 113 D.L.R. (4th) 368 (B.C.C.A.); *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62; *Newcastle Recycling Ltd. v. Clarington (Municipality)*, [2005] O.J. No. 5344 (C.A.); *Oglaza v. J.A.K.K. Tuesdays Sports Pub Inc.*, 2021 ONSC 7473; *Ontario (Attorney) v. Paul Magder Furs Ltd.* (1992), 10 O.R. (3d) 46 (C.A.); *R. v. Banks*, 2007 ONCA 19; *R. v. The Church of God (Restoration) Aylmer*, 2021 ONSC 3452; *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17; *Ryan v. Victoria (City)*, [1991] 1 S.C.R. 201; *Sobeys Capital Inc. v. Sentinel (Sherbourne) Land Corp.*, [2014] O.J. No. 5998 (S.C.); *The Corporation of the City of Brantford v. Montour et al.* [indexed as *Brantford (City) v. Montour*], 2010 ONSC 6253; *The Township of Amaranth v. Ramdas*, 2020 ONSC 2428; *Township of King v. 2424155 Ontario Inc.*, 2018 ONSC 1415; *Zexi Li v. Chris Barber et al.* (7 February 2022), Ottawa, CV-22-00088514-00CP (Ont. S.C.).

[31] The evidence provided by the moving parties is overwhelming and clearly establishes that:

- (i) the use of the Bridge is of vital importance to the residents and businesses in the immediate geographic area;
- (ii) since Monday, February 7, 2022 and continuing up to and including Friday, February 11, 2022, the protest has escalated to the point where the blockade has resulted in the closure of Canada-bound traffic and has severely limited U.S.-bound traffic;
- (iii) the protests and the blockade have had a significant negative impact on the residents and businesses in the immediate geographic area and numerous by-laws of the City have been breached; and

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- (iv) the protests and the blockade have had a significant negative impact on the automotive sector in a geographic range that is far beyond the Windsor area.

[32] The evidence provided by Mr. Blake-Gallipeau and Dr. Rosen falls far short of establishing that there is no blockade.

[33] Section 101 of the *Courts of Justice Act* provides that an interlocutory injunction or mandatory order may be granted where it appears to a judge of the court to be just or convenient to do so.

[34] The test for an interim injunction is clearly set out by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney-General)* at paras. 77-80. The test requires the moving party to demonstrate that:

- (a) there is a serious issue to be tried;
- (b) irreparable harm will result if the relief is not granted; and
- (c) the balance of convenience favours the moving party.

[35] With respect to injunctive relief under s. 440 of the *Municipal Act, 2001*, the statutory injunction test is different. It is narrower. Municipalities are often given statutory authorization to seek an injunction to restrain breaches of by-laws. The nature and extent of the court's discretion will turn on the terms of the statute. In such cases, the moving party will not ordinarily have to establish inadequacy of damages or irreparable harm and that the balance of convenience favours the granting of the injunctive relief.

[36] In this case, the moving parties have satisfied the broader *RJR-MacDonald* test for an injunction under s. 101 of the *Courts of Justice Act* and consequently, it is not necessary to address issues relating to the statutory test in detail.

A. Interim Injunction Under Section 101 of the *Courts of Justice Act*

a. Serious issue to be tried

[37] The threshold to satisfy this requirement is low and should be determined on the basis of common sense and an extremely limited review of the case on the merits: *RJR-MacDonald Inc.*, at para. 78. So long as the claim is not frivolous or vexatious, this factor of the test will generally be satisfied: *RJR-MacDonald Inc.*, at paras. 44-56, 78.

[38] The APMA, the City and the Attorney General have raised a serious issue to be tried by demonstrating that the Protesters have blocked and impeded access to the Bridge. The moving parties have demonstrated a number of causes of action that are neither trivial nor vexatious, including:

- (i) A claim in public nuisance. An individual may bring a private action in public nuisance by pleading and proving special damage. Such actions commonly involve allegations of unreasonable interference with a public right of way, such

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as a street or highway: see *Ryan*, at para 52; *Chessie v. J. D. Irving Ltd.* (1982), 140 D.L.R. (3d) 501 (N.B.C.A.). I accept the evidence submitted by the APMA and find that they have raised a serious issue as to whether the Protesters' conduct has caused special damage in the approximate sum of \$600 million to the automotive industry in Canada.

- (ii) A claim in intentional interference with economic relations, also known as the "unlawful means" tort. The three elements of the test for this tort, as set out in *Grand Financial Management Inc.* at para. 62, are seriously raised. I accept the evidence submitted by APMA and find that they have raised a serious issue as to whether a tort has been committed, in that they violate the City of Windsor's by-laws, including but not limited to ss. 7(1)(a) and 12 of by-law number 9148. s. 426 of the *Municipal Act, 2001*, s. 132 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 and various provisions of the *Criminal Code*, including ss. 175(1)(a)(iii), 180(2)(b), 430(1)(c) and (d), and 423(1)(g).

[39] The APMA, the City and the Attorney General have clearly demonstrated that there is a serious issue to be tried with respect to whether damages have been suffered, and will continue to be suffered, as a result of the Protesters' nuisance, intentional interference with economic/contractual relations, and other potential torts. The suggestion that the APMA, the City and the Attorney General have failed to demonstrate a serious issue to be tried was not credibly advanced by the parties opposing the motion.

[40] Injunctions enforcing public rights and public laws, including municipal by-laws, are readily granted: see *Caledon (Town)*.

b. Irreparable harm

[41] The second element of the *RJR-MacDonald* test, whether the moving parties will suffer irreparable harm if the injunction is not granted, has also been clearly met.

[42] What must be established on this part of the test is whether refusing to grant an injunction will cause harm that cannot be remedied at some later stage. "Irreparable harm" refers to the nature of the harm suffered, rather than its magnitude. "It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR-MacDonald Inc.*, at para. 59.

[43] The parties arguing on behalf of the Protesters argue that granting the injunction would result in irreparable harm being suffered by the Protesters by striking at their fundamental rights to freedom of expression, freedom of peaceful assembly and freedom of association under the *Canadian Charter of Rights and Freedoms*. I disagree.

[44] The APMA, the City and the Attorney General have clearly demonstrated the irreparable harm they have already suffered and that they will continue to suffer if the injunction is not granted.

[45] A review of the evidence clearly establishes the extent of the irreparable harm already caused, which has put the economy at risk. I accept the submissions of counsel to APMA and the Attorney General that, in these circumstances, it will be virtually impossible to recover damages

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from the Protesters. Beyond the specific irreparable harm to the automotive industry, the evidence establishes adverse impacts on the employment of members of the community, children's education, the community's access to critical services, the community's ability to access work, education and family in Detroit and the reputation of the City as a place to live, work and invest.

[46] There is no question that the Protesters' illegal blockade of the Bridge has caused and will continue to cause irreparable harm to the City, the residents of the City, the automotive industry, the businesses of Windsor and our economy if their unlawful conduct is permitted to continue.

c. Balance of convenience

[47] The third factor, the balance of convenience, considers which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits.

[48] The APMA, the City and the Attorney General do not seek to prohibit the right of the Protesters to express their views or exercise their rights. They are seeking to prohibit the Protesters' unlawful activity, which includes preventing and obstructing the public's access to the Bridge.

[49] The Protesters' claim of irreparable harm to their *Charter* rights if they are enjoined from committing unlawful acts does not outweigh the harm caused by those unlawful acts. The Protesters have no legal right to block or impede access to the Bridge. As Brown, J. (as he then was) said of the protesters blockading a Toronto-Montreal main railway line in *Canadian National Railway Co. v. Doe*, 2013 ONSC 115, at para. 11:

... While expressive conduct by lawful means enjoys strong protection in our system of governance and law, expressive conduct by unlawful means does not. No one can seriously suggest that a person can block freight and passenger traffic on one of the main arteries of our economy and then cloak himself with protection by asserting freedom of expression. The Canadian Charter of Rights and Freedoms does not offer such protection ...

[50] This statement is equally applicable to this blockade.

[51] There is no doubt that freedom of expression, as guaranteed by s. 2(b) of the *Charter*, and the related rights of freedom of conscience, peaceful assembly and association are some of the most important rights of a free and democratic society. However, freedom of expression, like all other *Charter* rights, is not an absolute right nor an unqualified one. The *Charter* does not give any person the legal right to unlawfully trample on the legal rights of others. Every *Charter* right must be balanced against other important values and rights.

[52] Simply put, freedom of expression does not extend to the point that the Protesters' activities can result in the denial of fundamental rights and freedoms to all those detrimentally affected by the blockade.

[53] While the Protesters involved in the blockade of the Bridge have every right to voice their criticism of government public health restrictions and/or vaccine mandates, they do not have the legal right, under the *Charter* or otherwise, to unilaterally block and impede access to the Bridge.

[54] Having reviewed the evidence and after hearing oral submissions, I have no hesitation in concluding that the harm caused by the Protesters' demonstrations and blockade far outweighs the value of the Protesters' right to express their views by illegal means. The Protesters' right to freedom of expression, assembly and association does not include violating the law or harming the people and businesses who reside and make a living in Windsor and everyone else who relies on the Bridge for those purposes.

B. Modified Test for a Statutory Interlocutory Injunction to Enforce Municipal By-Laws

[55] The APMA and the City also rely on s. 440 of the *Municipal Act, 2001* to enjoin the Protesters from continuing to violate the City's by-laws. Section 440, under the section "General Enforcement Powers," provides as follows:

Power to restrain

440 If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

[56] This section allows a municipality to bring an Application to restrain a person (or persons) from contravening its by-laws.

[57] I note that where a municipal authority seeks an injunction to enforce a by-law which it establishes is being breached, the courts will refuse the application only in exceptional circumstances: see *Newcastle Recycling Ltd.*, at para. 32.

[58] I agree with the submission of the Attorney General that absent a constitutional challenge to the by-laws in question, they are presumptively valid and remain in force and in effect. A consideration of the Protesters' *Charter* rights is therefore not required.

[59] It has been held that where an injunction is sought for the purpose of enforcing a municipal by-law, the traditional test for an injunction as set out above should be modified so that the first criterion (serious question to be tried) will be strongly emphasized to the exclusion of the other two criteria (irreparable harm and balance of inconvenience): see *Hamilton (City)*, at paras. 24, 28 and 31; *The Township of Amaranth*, at paras. 52-55.

[60] In this modified test, there is no need for the City to prove that it will suffer irreparable harm and there is no need to consider the balance of convenience because the public authority is presumed to be acting in the best interests of the public and a breach of the law is considered to be irreparable harm to the public interest: see *The Township of Amaranth*, at para. 54. However, in this modified test, the first criteria (serious issue to be tried) should be higher than the standard required when all three criteria are considered under the *RJR-MacDonald* test. A strong *prima facie* case must be established: *Hamilton (City)*, at para. 37.

[61] I find that a strong *prima facie* case has been established. It is clear that the unlawful actions of the Protesters, which include obstructing roads and the Bridge with vehicles, leaving their

- Page 11 -

vehicles idling and blocking and impeding the public's access to the Bridge, are breaches of the City's by-laws. City By-law number 9148 (ss. 7 and 12) regulates traffic within City limits and prohibits people from obstructing roads with their vehicles and more generally prevents people from obstructing any highway. The parking of multiple vehicles and the presence of many persons whose express intent is to block traffic is a clear violation of that by-law. Vehicles left idling by the Protesters is also a clear violation of City By-law 233-2001, s. 2:

2. (1) No person shall cause or permit a Motor Vehicle, a Commercial Motor Vehicle or a Boat to idle for more than three (3) continuous minutes (180 seconds);

Conclusion

[62] I find that the APMA, the City and the Attorney General have established the criteria for an injunction both on the modified test applied for statutory injunctions and the traditional test for a common law injunction to prohibit the Protesters from establishing a blockade or in any way impeding access to the Bridge in Windsor, Ontario.

[63] This Order does not in any way prevent the Protesters from lawfully expressing their message and views as long as they do not prevent the free flow of traffic across the Bridge.

[64] Respecting the rights of others to use the Bridge while allowing the Protesters to express their message in a way that does not prevent or impede others from using the Bridge is what is required in a society governed by the rule of law.



Chief Justice G.B. Morawetz

Date: February 14, 2022

DATE: 20051214
DOCKET: C42347

COURT OF APPEAL FOR ONTARIO

GILLESE, BLAIR and JURIANSZ

2005 CanLII 46384 (ON CA)

B E T W E E N :	)	
	)	
NEWCASTLE RECYCLING LTD.,	)	Cameron Murkar for NewCastle
WILLIAM HALE and JAMES HALE	)	Recycling Ltd.
	)	
Applicants/	)	
Respondents in the Counter-Application	)	
(Respondents in Appeal)	)	
	)	
- and -	)	
	)	
THE MUNICIPALITY OF CLARINGTON	)	Ian Godfrey & Melissa Panjer for
	)	The Corporation of the Municipality
	)	of Clarington
Respondent/	)	
Applicant in the Counter-Application	)	
(Appellant)	)	
- and -	)	
	)	
WALTER JOHN HALE, WALTER JOHN	)	
HALE in his capacity as trustee, JAMES	)	
HALE in his capacity as trustee and JCLJB	)	
HOLDINGS LTD.	)	
	)	
Respondents in the Counter-Application	)	
(Respondents in Appeal)	)	
	)	Heard: October 25, 2005

On appeal from the judgment of Justice R. Boyko of the Superior Court of Justice dated August 9, 2004.

JURIANSZ J.A.:

I. INTRODUCTION

[1] The Corporation of the Municipality of Clarington (“Clarington”) appeals from the judgment of Boyko J. of the Superior Court of Justice dated August 9, 2004, allowing in part an application brought by Newcastle Recycling Ltd. (“Newcastle”), William Hale and James Hale for a declaration that they have the right to continue operating an auto wrecking, scrapyard, landfill and garbage collection business on property located in Clarington. The application judge granted the declaration in respect of A3, but dismissed the application with respect to the remainder of the lands that comprise Lot 12.

[2] Clarington also appeals the dismissal of its counter-application in which it sought a declaration that the respondents’ business, with the exception of the auto wrecking and tire storage business carried on parcels B1 and B2, was not a legal nonconforming use and an injunction preventing the respondents from continuing to operate such business.

[3] The respondents cross-appeal from the application judge’s finding that they do not have the right to carry on their business on the portions of Lot 12 other than parcel A-3.

[4] In my view, the application judge erred in failing to order a trial to determine the issues relating to the A3, B1, and B2 parcels of Lot 12. Therefore, I would allow Clarington’s appeal in relation to these parcels. I would dismiss the respondents’ cross-appeal in so far as it relates to parcels E1, E2, and E3.

The parties

[5] The appellant, Clarington, was previously known as the Town of Newcastle. The Town of Newcastle was the product of amalgamation of the Township of Clarke and other municipalities.

[6] The individual respondents are members of the Hale family that has owned Lot 12, Concession 3 in Clarington or parts of it at various times since 1927. The corporate respondents are companies controlled by the members of the Hale family.

[7] The Township of Clarke enacted its first zoning bylaw on May 23, 1968, designating Lot 12 as an agricultural zone. Clarington passed a zoning bylaw in September 1984, which replaced the earlier bylaw but continued the agricultural zoning for Lot 12 with one relevant exception – parcels B1 and B2 were zoned to allow their use as an auto wrecking yard.

Parcel A3

[8] I will review only those facts necessary to explain my conclusion that the application judge erred by failing to direct a trial of an issue regarding whether there was a discontinuation of the claimed use of parcel A3.

[9] It is sufficient to say that persons other than the Hales or those related to them owned the parcels A1, A2, and A3 (the “A parcels”) for approximately fourteen years commencing in 1972. From 1981 until 1986, Dianne Warren and her husband Wayne owned the A Parcels. Ms. Warren provided an affidavit that during the time that she and her husband owned the A parcels, they were not used as an auto wrecking yard, scrapyard, landfill site or garbage dump; that the Hales did not operate a business on the A parcels; and that neither she nor her husband had an agreement permitting the Hales to do so.

[10] The application judge disbelieved Ms. Warren and preferred the testimony of Billy Hale that he had an agreement with Mr. Warren permitting him to use parcel A3 for the business.

[11] It is beyond the proper role of an application judge to determine the credibility of a deponent to resolve material facts which are disputed and which may affect the result: *Moyle v Palmerston Police Services Board* (1995), 25 O.R. (3d) 127 (Div. Ct.) at p. 136, *Yoo v. Kang*, [2002] O.J. 4041 (S.C.J.) at para. 24.

[12] The credibility issue that arose between Ms. Warren and Mr. Hale was pivotal to the result of the application. If Ms. Warren were to be believed, a discontinuance of the claimed legal nonconforming use would be established. In my view, the application judge should have directed the trial of an issue rather than resolving the credibility issue herself.

[13] During the hearing of the appeal, a question arose as to the legal effect of a statutory declaration given on behalf of the Warrens that their lands would be used only for agricultural purposes as permitted by the zoning bylaw. The statutory declaration was required by the Durham Land Division Committee as a condition to the granting of a severance of parcel A3 from the other A parcels. It was given and registered while the Warrens were owners of the A parcels. The Warrens subsequently conveyed parcel A3 to Newcastle. The Hales claim only an oral license from the Warrens to use parcel A3 for their business.

[14] While the resolution of this legal question may well be determinative of the respondents’ application in respect of parcel A3, it is best decided at the trial of the issue on a full evidentiary record. It would be unfair to decide the appeal on an issue not raised by the parties and which the respondents had not been prepared to argue.

Parcels B1 and B2

[15] As noted, Clarington recognizes that the respondents have the right to operate an auto wrecking and tire storage business on parcels B1 and B2. The issue is whether the operation

of a scrapyard, landfill, and garbage collection and/or garbage transfer business on these parcels is a nonconforming use.

[16] The application judge's conclusion regarding the B parcels is unclear. At para. 127 of her reasons she states that she is "satisfied the applicants have established legal nonconforming use on parcel B2 for bringing and storing 'white goods', such as fridges and stoves on parcel B1 and B2 before being recycled". This conclusion is apparently contradicted at para. 135, where she states: "the application is denied in respect of parcel B1 and B2. The legal nonconforming use of depositing white goods and scrap metal that arose prior to the passage of the 1968 zoning bylaw has since been discontinued by admission of the applicant".

[17] Paragraph 3 of the formal judgment, which dismisses Newcastle's application except in regard to parcel A3, is consistent with the conclusion at para. 135. However, the dismissal of Clarington's counter-application might be argued to be consistent with para. 127.

[18] Fortunately, it is unnecessary to decide whether the apparently contradictory reasons of the application judge contain a typographical error, as I am satisfied the record discloses a material credibility issue regarding the B parcels that requires the trial of an issue.

[19] The application judge noted, at para. 121, that Officer Creamer observed, during an inspection of parcels B1 and B2 during 1998 that there were "... among other things, large piles of fridges and other white goods, some drums, assorted tires, large piles of scrap car parts and pieces, radiators, fenders, body parts, miscellaneous sighting, paneling, small propane tanks, tricycles, microwave ovens, pipes, garden chairs, bicycles, highway exit signs, fencing and computers".

[20] However, the application judge stated, at para. 122, that she preferred Billy Hale's evidence "that no scrap was deposited in parcel B after 1974 and find that any scrap found on the property was deposited there before the use was discontinued in 1974, as there is no credible evidence to refute this".

[21] She then went on to conclude in para. 127 that the first charge of the bylaw violation in respect to parcels B1 and B2 was not made out as "the evidence doesn't establish a resumption of depositing scrap metal after 1972".

[22] However, as the appellant points out, Billy Hale on cross-examination admitted to "constantly removing and depositing scrap on parcels B1 and B2 ..." after 1974. In addition, there was the evidence of Wendy George, which the application judge summarized at paragraph 67 as follows:

Wendy George, employed by the Hales since 1989 to work in their office, deposed that between 1993 and 1998, Newcastle

Recycling Ltd.'s operation occurred most intensely on parcels B1, B2 and A3, but various operators were also instructed to dump their loads of scrap or other times [*sic*] for disposal on the southern end of Lot 12, namely parcels E1, E2, and E3."

[23] As the application judge notes, Ms. George was not cross-examined.

[24] In my view, the application judge, faced with this competing evidence, should have directed the trial of an issue. When the scrap presently on the B parcels was dumped is material to the determination of the application and counter-application.

Parcels E1, E2, and E3

[25] The application judge did not have to resolve any issues of credibility in finding that parcel E3 was always used for farming and had never been used for any of the disputed uses.

[26] Nor did the application judge have to resolve any issues of credibility in reaching the conclusion that any legal nonconforming use of parcels E1 and E2 ceased when Laidlaw Waste Systems Ltd. ("Laidlaw") was the owner of the E parcels. She found that Laidlaw capped the landfill mounds and there was a period of at least a year without any landfill or any other activity.

[27] The position of the respondents in their cross-appeal, as I understand it, is that it was always their intention to expand their operations southward from parcel A3.

[28] If one accepts all of the respondents' claims, their position is untenable in law. As noted, the respondents sold the A parcels without reservation in 1972. They also sold the E parcels in May of 1987, and did not reacquire them until May of 1998. Any intention the respondents had of expanding their operations on or onto the E parcels expired in May 1987, when they transferred ownership of those parcels to others without reservation. Any intention the respondents had of expanding on to the E parcels after they reacquired the property in 1998 was subject to the zoning provisions of the bylaw.

[29] The respondents attempt to rely on an alleged intention of Laidlaw to expand its landfilling operation. Assuming they can rely on the intention of a previous owner, they face insurmountable problems. First, any intention of expanding that Laidlaw might have had expired when Laidlaw discontinued its legal nonconforming use. Second, there was no admissible evidence of such an intention by Laidlaw.

[30] In my view, the cross-appeal must be dismissed.

Clarington's counter application for an injunction

[31] The application judge declined to grant Clarington's counter-application for an injunction because, in her view, there was no "compelling evidence that an injunction is warranted in the circumstances".

[32] The issue before the application judge was whether Clarington was entitled to a permanent injunction to enforce a bylaw. It was not necessary for Clarington to lead compelling evidence that the injunction was warranted. Where a municipal authority seeks an injunction to enforce a bylaw which it establishes is being breached, the courts will refuse the application only in exceptional circumstances.

[33] In my view, given that the evidence established that materials were being dumped or deposited on the lot in contravention of the bylaw, Clarington is entitled to the injunction sought in its counter-application in respect of the Lot 12, except in respect of parcels A3, B1 and B2. Its entitlement to a permanent injunction in respect of the A and B parcels is to be decided at the trial of the issues indicated.

The Costs Appeal

[34] The application judge took the view that the respondents were successful before her in that her decision allowed their business operation to continue, albeit on a portion of Lot 12. Therefore she fixed costs in the respondents' favour in the amount of \$52,000 inclusive of disbursements and GST.

[35] In view of the results of the appeal and cross-appeal, the costs order cannot stand. That costs order is set aside and the disposition of costs is remitted to be decided by the judge who hears the trial of the issues ordered.

CONCLUSION

[36] For these reasons, I would grant the appeal, and order the trial of issues before a different judge to determine whether there is a legal nonconforming use on parcels A3, B1 and B2. I would dismiss the cross-appeal, and vary the judgment below to grant a permanent injunction in respect of Lot 12 with the exception indicated.

[37] I would fix costs of the appeal and cross appeal in favour of Clarington on a partial indemnity scale in the amount of \$20,000 inclusive of disbursements and G.S.T.

"R.G. Juriansz J.A.
"I agree E.E. Gillese J.A."
"I agree R.A. Blair J.A."

RELEASED: December 14, 2005

CITATION: The Township of Amaranth v. Ramdas, 2020 ONSC 2428
COURT FILE NO.: CV-18-152
DATE: 2020 04 21

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE COPORATION OF THE
TOWONSHIP OF AMARANTH

Applicant

- and -

VIDHYA RAMDAS

Respondent

) D. Germain, for the Applicant

) Self-Represented

) **HEARD:** November 12, 2019

REASONS FOR DECISION

L. SHAW J.

OVERVIEW

[1] The respondent, Ms. Vidhya Ramdas (“Ms. Ramdas”), owns property in the Township of Amaranth. The applicant, the Corporation of the Township of

Amaranth (the “Township”), alleges that Ms. Ramdas breached its Site Alteration By-law by performing certain fill activities on her property that were not allowed without a permit. As Ms. Ramdas’ property is located within the Township, it is subject to the Township’s By-laws. It is also alleged that Ms. Ramdas failed to comply with a Stop Work Order and Remedial Order.

[2] The Township is seeking a declaration that Ms. Ramdas is in contravention of its Site Alteration By-law and Stop Work Order and Remedial Order. The Township also seeks a permanent injunction that Ms. Ramdas refrain from carrying out fill activities contrary to the By-law and that she be ordered to restore the property to its condition prior to the unauthorized fill activities.

[3] This application was heard at the same time as another application commenced by the Grand River Conservation Authority (the “GRCA”). The GRCA is also seeking a permanent injunction that Ms. Ramdas refrain from doing work on her property that is interfering with the wetland on which the property is located. Although the evidence for both applications was the same, separate reasons will be released regarding that application.

[4] For the reasons outlined below, the Township’s application is granted.

HISTORY OF THE PROCEEDINGS

[5] This application was commenced on August 15, 2018 and was first before the court on August 27, 2018. Although Ms. Ramdas had not yet filed responding materials, the court granted an interim injunction prohibiting her from all excavation and alteration of the grade and placement of fill or soil on her property and the removal of any fill, soil, peat or other native materials from her property. Ms. Ramdas was also ordered to file her responding materials by September 7, 2018. She did not comply with that term of the order.

[6] The matter was next before the court on September 17, 2018 and was adjourned on consent to December 3, 2018. That date was adjourned, on consent, to March 4, 2019. On March 4, 2019, the matter was adjourned, on consent, to June 3, 2019.

[7] On June 3, 2019, the matter was adjourned to November 12, 2019, peremptory. On that date, Coroza J. ordered that no further adjournments would be granted unless leave was granted by the judge hearing the matter on November 12, 2019. Ms. Ramdas was ordered to file her responding materials by September 30, 2019. Coroza J. also ordered that if Ms. Ramdas did not file her responding materials, the presumption was that the matter would proceed on November 12, 2019 without any input or submissions from her. Ms. Ramdas did not file any responding materials.

[8] When the matter was before me on November 12, 2019, Ms. Ramdas requested a further adjournment. I declined to grant the adjournment. The reasons for the denial were twofold. First, the application was commenced in August 2018. Ms. Ramdas had 15 months to file responding materials, which she failed to do. Second, Ms. Ramdas failed to comply with two court orders to file her materials by certain fixed dates. As the matter had been adjourned on a number of occasions, I found that Ms. Ramdas had ample opportunity to either retain a lawyer or file her own material. Based on the order of Coroza J., Ms. Ramdas was aware that the matter would proceed if she did not file her responding material. Given the delays in the proceeding, I declined her request for a further adjournment and heard the application.

[9] Court orders are not recommendations or suggestions. On two separate occasions, Ms. Ramdas was ordered to file responding materials and she deliberately did not comply with those orders. When a party is self-represented, the court will often grant indulgences in order to ensure that access to justice is achieved and that the matter is dealt with substantively. For example, self-represented litigants are often unfamiliar with the various rules surrounding the court process, such as when materials must be served and filed.

[10] In this case, Ms. Ramdas was twice given dates to file her materials. She provided no acceptable explanation with respect to why she did not comply with

those orders. She had 15 months to file material and the matter was adjourned a number of times. Given her deliberate non-compliance and the length of time that this application was outstanding, I declined to exercise my discretion to grant a further adjournment.

REVIEW OF THE APPLICABLE LEGISLATION

[11] Before reviewing the uncontested evidence in this matter, I will review the applicable legislation and the by-law which the Township alleges Ms. Ramdas breached.

[12] This application is brought under r. 14.05(3)(d) and (g) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as it relates to the determination of rights that depend on the interpretation of a municipal by-law. It also involves a request for injunctive relief. As the evidence is not contested and there are no material facts in dispute, it is appropriate that this matter be heard by way of an application.

[13] The evidence relied upon by the Township includes an affidavit from an employee from the County of Dufferin. It also relies on the affidavit evidence filed on behalf of the GRCA in the companion action.

[14] The Township is empowered to make by-laws that control the placement of fill and alteration of grades within its boundaries. The authority for making such

by-laws is found in s. 142(2) of the *Municipal Act, 2001*, S.O. 2001, c. 25, which states as follows:

Without limiting sections 9, 10 and 11, a local municipality may,

- (a) prohibit or regulate the placing or dumping of fill;
- (b) prohibit or regulate the removal of topsoil;
- (c) prohibit or regulate the alteration of the grade of the land;
- (d) require that a permit be obtained for the placing or dumping of fill, the removal of topsoil or the alteration of the grade of the land; and
- (e) impose conditions to a permit, including requiring the preparation of plans acceptable to the municipality relating to grading, filling or dumping, the removal of topsoil and the rehabilitation of the site.

[15] Pursuant to s. 142(2) of the *Municipal Act, 2001*, the Township passed Site Alteration By-law 65-2009, as amended by By-law 28-2014 (“Site Alteration By-law”). The Township alleges that Ms. Ramdas was in breach of ss. 2, 3 and 4 of the By-law, which state as follows:

- 2. No person shall dump, place or remove fill or cause or permit fill to be dumped, placed or removed on any property in the Township.
- 3. No person shall alter the grade of any land or cause or permit the grade of any land to be altered on any property in the Township.
- 4. No person shall dump, place or remove soil or cause or permit soil to be dumped, placed or removed on any property in the Township.

[16] The term “fill” is defined in s. 1 of the Site Alteration By-law as “any type of material deposited or placed on lands, and includes soil, topsoil, aggregate

material, stone, concrete, peat, sod or turf either singly or in combination". The term "fill activities" means "importing, placing, depositing and/or removing fill – with fill being as defined in the Site Alteration By-law- and altering the grading".

[17] The Site Alteration By-law also specifies what steps can be taken if there is a breach of the By-law. Sections 9 and 10 state as follows:

9. Every person who places or dumps fill or who causes or permits to be placed or dumped and every person who alters the grade of any land or who causes or permits the grade of any land to be altered and every person who places or removes soil or who causes or permits the removal of soil in the Township contrary to this By-law shall remove such fill or replace such soil and restore the existing grade of the land.

10. Where an Owner of land fails to do any work required by a permit issued pursuant to this By-law or pursuant to Section 9 of this By-law the Township may undertake such work and for this purpose may enter on the Owner's land with its employees and agents. The Township may recover the costs of such work from any security held in respect of the lands in question, or such costs may be added to the tax roll.

[18] Pursuant to these sections, the Township seeks an order that Ms. Ramdas remove any fill she imported onto the property without a permit. The Township also seeks an order that Ms. Ramdas replace any fill she removed and to restore the existing grade of the land. If she fails to do so, pursuant to s. 10 of the Site Alteration By-law, the Township seeks an order that it be permitted to enter the property to perform the work.

[19] Section 440 of the *Municipal Act, 2001* outlines general enforcement powers. It states as follows:

If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

[20] The *Municipal Act, 2001* also permits municipalities to make orders to discontinue an activity which contravenes a by-law. Section 444(1) states as follows:

If a municipality is satisfied that a contravention of a by-law of the municipality passed under this Act has occurred, the municipality may make an order requiring the person who contravened the by-law or who caused or permitted the contravention or the owner or occupier of the land on which the contravention occurred to discontinue the contravening activity.

[21] Lastly, s. 446(1) of the *Municipal Act, 2001*, provides for remedial orders. It states as follows:

If a municipality has the authority under this or any other Act or under a by-law under this or any other Act to direct or require a person to do a matter or thing, the municipality may also provide that, in default of it being done by the person directed or required to do it, the matter or thing shall be done at the person's expense.

REVIEW OF THE EVIDENCE

[22] Ms. Ramdas owns and resides at the property with a municipal address of 504386 Highway 89 in the Township of Amaranth, legally described as Part Lot 32, Concession 5, Parcel 10 ("the property").

[23] On July 4, 2018, Mr. Jason Wagler (“Mr. Wagler”), a Resource Planner with the GRCA, received an email from the Director of Planning at the Township indicating that a councillor had observed multiple truckloads of material entering the property.

[24] On July 5, 2018, Mr. Wagler and Ms. Kaitlyn Rosebrugh (“Ms. Rosebrugh”), a Regulations Officer with the GRCA, attended at the property. Mr. Wagler observed an excavator loading material into a dump truck. He also observed a dump truck leaving the property. Ms. Rosebrugh’s evidence was that she observed a large excavator extracting material behind the house and a fill pile on the west side of the house within the area that is regulated by the GRCA.

[25] When Mr. Wagler and Ms. Rosebrugh were at the property on July 5, 2018, there were three other individuals present: the operator of the excavator, a man with a shovel stamping material in the dump truck, and a person standing to the side of an excavated hole. That person indicated that he was the contractor/supervisor. He told Mr. Wagler that Ms. Ramdas had a GRCA permit. Mr. Wagler informed the contractor that he had done a search of the GRCA’s records which indicated that Ms. Ramdas did not have a permit. Mr. Wagler advised the contractor to stop the work as it was in violation of a regulation. The contractor told Mr. Wagler that he would not stop the work as he did not believe a permit was necessary. Mr. Wagler’s evidence was that this person was verbally

abusive to him and threatened to throw him in the excavated hole if he did not leave the property.

[26] Ms. Rosebrugh's evidence was that this individual also said that Ms. Ramdas was away for two weeks and that she had authorized him to complete the work.

[27] While on site, Mr. Wagler noted that site grading was occurring within the area regulated by the GRCA. He also observed that a large trench had been excavated and that the grading appeared to extend beyond the trench into the wetland. The soils in the trench were dark and appeared to be characteristic of a wetland. The contractor also confirmed that they were removing the peat and replacing it with fill material.

[28] On July 10, 2018, the Township received complaints regarding fill activities taking place at the property. The following day, Mr. Lammerding, a By-law Enforcement Officer with the Corporation of the County of Dufferin attended at the property. According to Mr. Lammerding, the Township contracts with the County of Dufferin to carry out by-law enforcement and therefore one of his responsibilities is to enforce the Township's by-laws.

[29] When Mr. Lammerding attended at the property, he spoke with Ms. Ramdas' son, Avi Ramdas, as Ms. Ramdas was not present. Mr. Ramdas told Mr. Lammerding that he did not think any permits were required for the fill

activities. According to Mr. Lammerding, Mr. Ramdas handed him a cellphone and someone named Tina told him to leave the property. As Mr. Lammerding was leaving the property, he observed fill materials being deposited and removed from the property. He took photographs of a dump truck and excavator on the property.

[30] Mr. Lammerding prepared an investigation report detailing what occurred on July 11, 2018. According to the report, Mr. Lammerding observed a dump truck entering the property that appeared to be carrying broken concrete or concrete blocks. He observed this material being dumped in an area behind the house on the property. He also observed an excavator on the property loading a top soil/peat-like material into the dump truck that then left the property.

[31] On July 12, 2018, Ms. Rosebrugh chartered a plane and requested that the pilot circle the property. She observed a large yellow excavator extracting dark soil and placing the soil into a dump truck. She also observed a bulldozer on the property. She concluded that the development was continuing and expanding despite the GRCA's request on July 5, 2018 that the work end.

[32] On July 13, 2018, Ms. Rosebrugh attended the Provincial Offences Court in Orangeville and swore an information to charge Ms. Ramdas. The charges on the information were for a violation under s. 28(16) of the *Conservation Authorities Act*, R.S.O. , 1990 c. 27, as amended. This section prohibits

undertaking development or permitting another person to undertake development, in particular, the dumping and removal of material, without obtaining an authorization of a development permit in or on the areas within the jurisdiction of the GRCA, contrary to s. 2(1) of the *Grand River Conservation Authority: Regulation of Development, Interference With Wetlands and Alterations to Shorelines and Watercourses, Ontario Regulation, O. Reg. 150/06*, made pursuant to the *Conservation Authorities Act*.

[33] On July 13, 2018, Mr. Lammerding prepared a Stop Work Order and Remedial Order against Ms. Ramdas. That Order stated as follows:

You are hereby ordered to cease immediately all excavation, alteration of the grade and placement of fill or soil on the Property and further to cease immediately all removal of fill, soil, peat or other native materials from this property.

You are further ordered to remove all imported material and to restore the grade of the Property to its original condition on or before July 23, 2018.

[34] The notice also indicated that the actions of site alteration, placing fill, and removal of top soil/peat-like materials, without approvals or permits, carried with it the risk of possible legal action and penalties. The notice informed Ms. Ramdas that failure to comply with the Order would result in further legal action.

[35] On July 16, 2018, Mr. Lammerding personally delivered the Stop Work Order and Remedial Order to Ms. Ramdas. He posted it at the entrance to the property and also sent Ms. Ramdas a copy by registered mail. When he attended

at the property on July 16, 2018, Ms. Ramdas told Mr. Lammerding that she did not think she needed a permit for the fill activities.

[36] On July 19, 2018, Ms. Rosebrugh served Ms. Ramdas with a summons to appear in court.

[37] On August 11, 2018, Mr. Lammerding attended at the property again as the Township received complaints about ongoing fill activities. While at the property, Mr. Lammerding was told by one of the contractors on site, Mr. Keith McDonald ("Mr. McDonald"), that Ms. Ramdas had been issued a building permit by the County of Dufferin to fix the foundation of her house. He believed that the permit also permitted the fill activities. Mr. Lammerding spoke to another contractor that day, Ms. Tina McDonald ("Ms. McDonald"), who told him that about 600 loads of fill had been imported to the property and that an equal amount of peat had been removed.

[38] While Mr. Lammerding was at the property on August 11, 2018, he observed two loads of fill arrive. Mr. Lammerding advised the contractor that the Stop Work Order remained in place.

[39] On August 13, 2018, Mr. Wagler received an email from the Township advising that site excavation was continuing at the property.

[40] On August 14, 2018, Mr. Wagler and Ms. Rosebrugh conducted a site inspection of the property from the roadside. They both observed an excavator dumping soil into a dump truck in the GRCA-regulated area.

[41] On August 16, 2018, Mr. Wagler and Ms. Rosebrugh attended a meeting with Ms. Ramdas and the contractors, Mr. and Ms. McDonald. Ms. Ramdas gave Mr. Wagler a copy of the building permit issued by the County of Dufferin on July 26, 2018 to repair the foundation around the home. Mr. Wagler's evidence was that he observed the permit drawing, but did not observe any mention or drawing depicting the excavation and filling of material beyond the foundation of the house.

[42] A further meeting was arranged for August 22, 2018 at the property. When Mr. Wagler attended at the property, he saw Mr. McDonald operating a small excavator at the front of the house. Mr. McDonald informed both Mr. Wagler and Ms. Rosebrugh that the on-site meeting was cancelled and that they did not have permission to access the property.

[43] On August 31, 2018, Ms. Rosebrugh obtained a search warrant to access the property for the purpose of collecting evidence for charges laid under s. 28(16) of the *Conservation Authorities Act*.

[44] On September 11, 2018, Mr. Wagler, Ms. Rosebrugh and Mr. Robert Messier ("Mr. Messier"), an ecologist with the GRCA, attended at the property to

execute the search warrant to obtain evidence of development in the wetland. Both Mr. Wagler and Ms. Rosebrugh observed that fill placement and grading had occurred. That same day, photographs and soil samples were taken. Ms. Rosebrugh observed several excavated areas where dark organic soils had been extracted by machinery and imported fill had been placed. A large yellow excavator and a bulldozer were parked on the property.

[45] Mr. Messier's evidence was that he assisted and observed Mr. Wagler to collect Global Position System ("GPS") co-ordinates to delineate the extent of the development. Based on Mr. Wagler's analysis using the GPS co-ordinates, he concluded that the development of fill activities extended 64 metres from the rear of the house and that approximately 5,235 square meters of wetland had been impacted by the development.

ISSUES

[46] There are two issues to be determined on this application:

1. Whether Ms. Ramdas' actions constitute a breach of the Township's Site Alteration By-law and Stop Work Order and Remedial Order?
2. If so, whether injunctive relief is the appropriate remedy?

ANALYSIS**Issue #1: Whether Ms. Ramdas' Actions Constitute a Breach of the Township's Site Alteration By-Law and Stop Work Order and Remedial Order?**

[47] The following uncontroverted evidence leads me to conclude that Ms. Ramdas was in breach of the Township's Site Alteration By-law:

- The observations made by Mr. Wagler and Ms. Rosebrugh on July 5, 2018 of an excavator loading material into a dump truck and the dump truck leaving the property;
- Ms. Rosebrugh's observation on July 5, 2018 of an excavator extracting material behind the house;
- Mr. Wagler's observation on July 5, 2018 that a large trench had been excavated;
- The contractor informed Mr. Wagler on July 5, 2018 that they were removing peat from the property and replacing it with fill;
- Mr. Lammerding's observation on July 11, 2018 of a dump truck entering the property and dumping what appeared to be broken concrete or concrete blocks;

- Mr. Lammerding's observation of an excavator loading top soil/peat-like material into a dump truck and the dump truck leaving the property;
- Ms. Rosebrugh's observations on July 12, 2018 of an excavator extracting dark soil and placing it into a dump truck;
- Mr. Lammerding was informed by one of the contractors on August 11, 2018 that 600 loads of fill had been imported to the property and an equal amount had been removed;
- Mr. Wagler's and Ms. Rosebrugh's observation on August 14, 2018 of an excavator dumping soil into a dump truck at the property;
- Ms. Rosebrugh's observation on September 11, 2018 of several excavated areas where dark organic soils had been extracted and replaced with imported fill; and
- A number of photographs filed as evidence also depict the machinery on the property and the various fill activities described by the witnesses. These photographs also confirm that the work being done was well beyond the area around the foundation of the house.

[48] These fill activities required a permit from the Township which Ms. Ramdas did not obtain. Even after being informed that the work must stop, and after being

served with a Stop Work Order and Remedial Order, Ms. Ramdas chose to ignore the orders and continue with the fill activity. Therefore, there was a deliberate and continuing breach of the Site Alteration By-law and Stop Work Order and Remedial Order after Ms. Ramdas was informed that a permit was required and was directed to return the fill she had removed from the property, remove the fill she had brought onto the property, and return the property to its condition prior to the fill activities.

[49] Based on this evidence, I am satisfied that the Township has proven that Ms. Ramdas was in breach of the Site Alteration By-law and the Stop Work Order and Remedial Order.

Issue #2: Is Injunctive Relief the Appropriate Remedy?

[50] Having been found in breach of the Site Alteration By-law and the Stop Work Order and Remedial Order, the next issue is whether injunctive relief is the appropriate remedy.

[51] The Township is seeking a permanent injunction pursuant to s. 440 of the *Municipal Act, 2001*. In this case, the Township has authority to control the quantity and quality of fill that is imported and deposited onto Ms. Ramdas'

property under ss. 2, 3, and 4 of the Site Alteration By-law. In addition, ss. 9 and 10 of the Site Alteration By-law contemplates the relief sought.

[52] Where a by-law has been contravened, a municipality may seek injunctive relief for such contraventions pursuant to the provisions of the *Municipal Act, 2001: Tay (Township) v. Switzer*, [2002] O.J. No. 5380 (S.C.), at para. 31.

[53] The three-part test for an interim injunction is: (1) whether there is a serious issue to be tried; (2) whether the moving party would otherwise suffer irreparable harm; and (3) whether the balance of convenience favours granting the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at paras. 77-80.

[54] In this case, the Township seeks a statutory injunction pursuant to s. 440 of the *Municipal Act, 2001*. In seeking a statutory interim injunction, irreparable harm and balance of convenience do not need to be considered. This is because the public authority is presumed to be acting in the best interests of the public and a breach of the law is considered to be irreparable harm to the public interest: *York (Regional Municipality) v. DiBlasi*, 2014 ONSC 3259, at para. 62. Accordingly, the only inquiry is whether there is a serious issue to be tried.

[55] In this case, the Township is seeking a permanent injunction to enforce a by-law. It is therefore not necessary for the Township to lead compelling evidence that the injunction is warranted. As noted by the court in *Newcastle*

Recycling Ltd. v. Clarington (Municipality), [2005] O.J. No 5344 (C.A.), at para. 32: “Where a municipal authority seeks an injunction to enforce a bylaw which it establishes is being breached, the courts will refuse the application only in exceptional circumstances.”

[56] The Township has led evidence that the Site Alteration By-law was breached. The evidence led, which I accept, is that the Township attempted to compel compliance through service of a Stop Work Order and Remedial Order. Nonetheless, Ms. Ramdas continued to contravene the Site Alteration By-law even after being served with the Order. Given the ongoing and deliberate breaches of the Site Alteration By-law and Stop Work Order and Remedial Order, I find that an injunction is an appropriate remedy.

[57] Furthermore, the public also has an interest in having by-laws enforced. In this case, the Township attempted to enforce the Site Alteration By-law by serving Ms. Ramdas with a Stop Work Order and Remedial Order, which she ignored. As a result, as authorized by s. 440 of the *Municipal Act, 2001*, a stronger remedy in the form of an injunction is required to enforce compliance. I also agree that it is in the public interest that such an order be made particularly where there has been a persistent and deliberate flouting of the by-law: *City of Toronto v. Polai* (1970), 1 O.R. 483 (C.A.); *Lakehead Region Conservation Authority v. Demichele*, [2009] O.J. No. 5858 (S.C.), at para. 41.

[58] In addition to seeking an injunction prohibiting Ms. Ramdas from all excavation, alteration of the grade, placement of fill or soil on the property and the removal of fill, soil, peat or other native materials from the property, the Township also seeks an order that Ms. Ramdas take steps to return the property to the condition that existed in June 2018, prior to the fill activities. It also seeks an order that the Township be allowed onto the property to complete the work, should Ms. Ramdas fail to do so. It seeks this relief pursuant to s. 446 of the *Municipal Act, 2001*.

[59] Sections 9 and 10 of the Site Alteration By-law specifically contemplate this relief being sought. Ms. Ramdas was served with an order that she return the property to its previous condition. She failed to do so. Accordingly, it is appropriate to grant the relief sought by the Township.

ORDER

[60] For the reasons outlined above, I make the following order:

1. A declaration that the Respondent, Vidhya Ramdas, owner of lands legally described as Part Lot 32, Concession 5, Parcel 10, and as more particularly described in the Parcel Register as PIN 34055-0056 (LT), and with a municipal address of 504386 Highway 89 in the Township of Amaranth, Ontario ("Property"), is in contravention of the Township By-law 65-2009, as amended by Township By-law 28-2014 ("Site Alteration By-law");

2. A declaration that the Respondent, Vidhya Ramdas, is in violation of the Stop Work Order and Remedial Order, issued July 13, 2018;
3. An order for a permanent injunction prohibiting and restraining the Respondent, Vidhya Ramdas, from carrying on all Fill Activities on the Property without Township authorization being granted pursuant to the Site Alteration By-law;
5. An order requiring the Respondent, Vidhya Ramdas, at her cost, to remove from the Property all fill and topsoil and all non-soil debris which have been illegally placed on the Property ("Fill Materials") within 60 days from the date of this Order and to legally dispose of the Fill Materials elsewhere;
6. An order requiring the Respondent, Vidhya Ramdas, at her cost, to regrade the Property to its previous condition so that the grading is consistent with the previous condition as it existed in June 2018, within 60 days from the date of this order;
7. An order requiring the Respondent, Vidhya Ramdas, at her cost, to file with the Township an engineering report under seal confirming that the requirements of subparagraphs 5 and 6 have been complied with within 90 days from the date of this order;
8. An order requiring the Respondent, Vidhya Ramdas, to reimburse the Township for its costs incurred in carrying out its enforcement activities, including the costs charged to it by the County for by-law enforcement, and its invoices from Thomson Rogers, being the Township Solicitors (which invoices are separate from the subsequent costs being incurred to carry on this litigation) and which costs are to constitute a lien and charge against the Property and which costs, if not paid, may be added to the Respondent's tax roll and collected in the same manner as municipal taxes;
9. An order permitting the Township and its agents to enter onto the Property and carry out the provisions of subparagraphs 5 and 6 at the cost of the Respondent, Vidhya Ramdas, should she fail to meet the requirements, including the meeting of timelines set out in subparagraphs 5, 6, and 7, and with this right ongoing so long as such requirements are not satisfied, and further directing that the Respondent, Vidhya Ramdas, shall pay all costs for the removal and disposal of all Fill Materials located on the Property and regarding, and the costs of any necessary clean up

and remediation measures of the Property, which costs are to constitute a lien and charge against the Property and which costs, if not paid, may be added to the Respondent's tax roll and collected in the same manner as municipal taxes; and

10. A declaration that no action or inaction taken by the Township or its agents pursuant to the terms of this order makes the Township or its agents liable for the remediation or clean up of the Property in the event that a contaminant, as defined in the *Environmental Protection Act*, R.S.O. 1990, E. 19, as amended, is found on the surface of, in, or under the surface of the Property.

[61] The Township is entitled to its costs. According to its Bill of Costs, it seeks partial indemnity costs of \$20,615 and disbursements of \$2,117.40. These fees are significantly more than what was incurred by GRCA in the companion action, although GRCA filed more detailed affidavits in support of its claim. When I consider the reasonable expectations of parties in assessing costs, I have considered the costs incurred by GRCA as compared to the Township. Given this factor, together with the hourly rates and time spent, I have assessed a reasonable amount of costs to be \$15,000. Accordingly, Ms. Ramdas shall pay the Township costs and disbursements of \$17,117.40 by October 1, 2020.

L. Shaw J.

CITATION: The Township of Amaranth v. Ramdas, 2020 ONSC 2428
COURT FILE NO.: CV-18-152
DATE: 2020 04 21

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COPORATION OF THE TOWONSHIP
OF AMARANTH

Applicant

- and -

VIDHYA RAMDAS

Respondent

REASONS FOR DECISION

L. Shaw J.

Released: April 21, 2020

CITATION: Her Majesty the Queen in Right of Ontario v. Adamson Barbecue Limited, 2020 ONSC 7679

COURT FILE NO.: CV-20-00652216-0000

DATE: 20201211

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

**HER MAJESTY THE QUEEN IN
RIGHT OF ONTARIO**

Applicant

– and –

**ADAMSON BARBECUE LIMITED
AND WILLIAM ADAMSON SKELLY**

Respondents

*Ananthan Sinnadurai, Andi Jin and Adam
Mortimer, for the Applicant*

*Geoffrey Pollock, Leo Ermolov, Sam Goldstein
and Alexander Wilkes, for the Respondents*

HEARD: December 4, 2020 by remote
videoconference

KIMMEL J.

REASONS FOR DECISION – RESTRAINING ORDER

The Background to this Application

[1] These are unprecedented times. A state of emergency was declared under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 (the “EMCPA”) by the Premier of Ontario on March 17, 2020 as a result of the outbreak of the highly communicable COVID-19 (coronavirus disease) that was determined to constitute a danger of major proportions that could result in serious harm to Ontarians (the “pandemic”).

[2] As part of its response to the pandemic, the Ontario government enacted the *Reopening Ontario (A Flexible Response to COVID-19) Act*, 2020, S.O. 2020, c. 17 (“ROA”). The ROA continued various orders that had been made pursuant to s. 7.0.1 of the EMCPA. The ROA sets out a regulatory framework by which the government

determines staged control measures to be applied to public health units across the Province. The ROA was designed to allow for a targeted approach to identify what stage a public health unit would be placed in based on epidemiological statistics, among other considerations. Ontario's Response Framework published on November 22, 2020 describes the risk factors and priorities that the control measures are attempting to balance through the targeted approach, including:

- a. Limiting the transmission of COVID-19;
- b. Avoiding business closures;
- c. Maintaining health care and public health system capacity;
- d. Protecting vulnerable Ontarians, such as the elderly and those with compromised immune systems; and
- e. Keeping schools and child-care centres open.

[3] As the number of cases of COVID-19 in the City of Toronto continued to rise in November 2020, the public health unit of the City of Toronto was placed into the Stage 1 - Lockdown Zone, under Regulation 82/20 on November 23, 2020 (the "Stage 1 Regulation"). This stage imposes the maximum control measures.

[4] While permitted to remain open, the Stage 1 Regulation means that restaurants operating in Toronto can only provide take-out, drive through or delivery services—eating inside or outside on a patio is prohibited. Persons responsible for these businesses are required to ensure the use of masks or face coverings and adherence to physical distancing requirements indoors and to prevent patrons from lining up or congregating indoors or outdoors without proper physical distancing and masks or face coverings. They also are required to have a safety plan. These are collectively the "Stage 1 control measures".

[5] There are three Adamson BBQ restaurants: two located in the City of Toronto, and one located in Aurora.¹ The Aurora location is not in the City of Toronto public health unit and is currently subject to different restrictions under Regulation 82/20.

[6] On November 23, 2020, the day Toronto was made subject to the Stage 1 Regulation, a posting was made to the respondents' Instagram account @adamsonbarbecue with the written caption: "Enough is enough – we're opening.

¹ After commencing this application, the Crown learned that the Leaside location was run by Mr. Skelly, the Etobicoke location was operated through a company called Adamson Bar-B-QUE and the Aurora location was operated through a company called Adamson Barbecue Limited. Mr. Skelly is the sole director and officer of the corporations and operates all three restaurants. They have a shared website and shared social media accounts.

Page: 3

Starting Tuesday, November 24th, the Adamson Barbecue Etobicoke location will be open for dine-in service.”

[7] True to their word, the Etobicoke restaurant opened for indoor and patio dining on November 24, 2020. It opened again on November 25 and 26, 2020 despite the various charges that were laid against the respondents under the ROA, the *Toronto Municipal Code*, the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 (the “HPPA”) and the *Provincial Offences Act*, R.S.O. 1990, c. P.33 over the course of these three days. Eventually, Mr. Skelly was arrested on November 27, 2020 and charged with mischief and obstruction of a police officer pursuant to the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. City staff and police eventually secured the Etobicoke restaurant on November 27, 2020 by boarding up its entrances and windows from the inside and placing fencing around the property. Toronto Police had maintained a continuous presence at the location up until the hearing date.

[8] Following an urgent hearing that was convened before me on December 4, 2020 at the request of the applicant, I signed an order pursuant to s. 9 of the ROA, restraining the respondents and any other corporation under their control or direction (including Adamson Bar-B-Que Limited), their servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or who has or assumes responsibility for all or part of any business carried on by them in the Province of Ontario, from directly or indirectly, by any means whatsoever, contravening Ontario Regulation 82/20 at any restaurant owned or operated by one or both of the respondents or any corporation under their control or direction (including Adamson Bar-B-Que Limited) that is subject to Ontario Regulation 82/20.

[9] These are the reasons upon which that restraining order was made.

The Statutory Framework

[10] The Court is authorized to grant a restraining order sought by the Crown pursuant to s. 9 of the ROA:

Proceedings to restrain contravention of order

9 Despite any other remedy or any penalty, the contravention by any person of a continued section 7.0.2 order may be restrained by order of a judge of the Superior Court of Justice upon application without notice by the Crown in right of Ontario or a member of the Executive Council and the judge may make the order and it may be enforced in the same manner as any other order or judgment of the Superior Court of Justice.

[11] The Stage 1 Regulation is a continued s. 7.0.2 order to which s. 9 applies.

Urgency, Notice and the Respondents' Position

[12] The applicant was not required to give notice to the respondents of the order sought, but it did so, albeit with the intention of proceeding on an abbreviated timetable. The Respondents indicated that they were not prepared to respond on the abbreviated timetable proposed and contended that the urgency was alleviated by Mr. Skelly's bail conditions, among other things.

[13] In my December 2, 2020 scheduling endorsement, *Her Majesty the Queen in Right of Ontario v. Adamson Barbecue Limited*, 2020 ONSC 7446, I ordered and directed:

...the application to proceed on Friday December 4, 2020 as if it was *ex parte*. I have indicated that if an order is made following this hearing, I expect that it will provide for some mechanism for the respondents to come-back on a timely basis to raise their challenges and seek to have it set aside, varied or terminated if they are so inclined (the "come-back provision").

Thus, while the respondents are on notice and have had the option to respond to and participate in the hearing of the application, I am not requiring them to do so within this time frame. If an order is granted following the hearing, the respondents will be given a further opportunity to raise their challenges after having sought further legal advice, so that their challenges can be informed by that advice.

[14] The Respondents advised the court on December 4, 2020 that they were taking no position and did not oppose the order sought by the applicant, save and except in respect of the time for their commencement of any come-back motion and the applicant's request for costs (the "procedural objections").

The Test for a Statutory Injunction and Underlying Rationale

[15] This is the first time a court has been asked to grant a restraining order under s. 9 of the ROA. Statutory injunctions, either mandating or restraining regulated conduct, have been the subject of judicial consideration under other statutes. The test that has developed in the jurisprudence under those other statutes is instructive in this case.

[16] For a statutory injunction to be granted, the applicant must establish on a balance of probabilities a "clear breach" of an enactment.

[17] Although the requirements of irreparable harm and the balance of convenience that animate the test for an equitable injunction have been held not to apply to statutory injunctions, where a breach is established, the Court retains residual discretion to decline to grant an order in "exceptional circumstances". See *Retirement Homes Regulatory Authority v. In Touch Retirement Living for Vegetarians/Vegans Inc.*, 2019 ONSC 3401, at para. 48; see also *Gavin Downing v. Agri-Cultural Renewal Co-operative Inc. O/A Glencolton Farms ("ARC") et al*, 2018 ONSC 128, at para. 110.

[18] However, where a public authority seeks injunctive relief to prevent the contravention of a law, the public interest in having the law obeyed will generally outweigh considerations such as the balance of convenience and irreparable harm. See *York (Regional Municipality) v. DiBlasi*, 2014 ONSC 3259 (“*DiBlasi*”), citing *Vancouver (City) v. Zhang*, 2009 BCSC 84, 92 B.C.L.R. (4th) 131 (“*Zhang*”), at para. 18:

This is because the legislative authority is presumed to have taken into consideration the various competing interests of the public in enacting the legislation which is being contravened; the public has a direct and substantial interest in the enforcement of the law; and open defiance of the law constitutes irreparable harm to the public interest: *British Columbia (Minister of Forests) v. Okanagan Indian Band* (1999), 37 C.P.C. (4th) 224, B.C.J. No. 2545 (S.C.), aff’d 2000 BCCA 315, 187 D.L.R. (4th) 664; *Attorney-General for Ontario v. Grabarchuk* (1976), 1976 CanLII 574 (ON SC), 11 O.R. (2d) 607, 67 D.L.R. (3d) 31 (Div. Ct.).

[19] This reflects the general view that in dealing with matters of public health and welfare, it is for the policy decision makers in the Ontario legislature, not the court, to weigh the benefits to the public good and determine how to balance the individual rights with the public good: see *Downing*, at para. 102.

[20] The factors to be considered in determining whether to grant a statutory injunction are circumscribed. As summarized in *Retirement Homes Regulatory Authority*, at para. 47, there are many common law or equitable considerations that are not applicable in the context of the court’s restraint of regulated conduct:

- a) The court's discretion is more fettered. The factors considered by a court when considering equitable relief will have a more limited application;
- b) An applicant will not have to prove that damages are inadequate or that irreparable harm will result if the injunction is refused;
- c) Proof of damages or proof of harm to the public is not an element of the legal test;
- d) There is no need for other enforcement remedies to have been pursued;
- e) The court retains a discretion as to whether to grant injunctive relief. Hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed. However, an injunction will not issue where it would be of questionable utility or inequitable; and
- f) It remains more difficult to obtain a mandatory injunction.

[21] In seeking this type of statutory injunction, the applicant is also not required to:

- a. prove actual damages suffered. See *College of Opticians of British Columbia v. Coastal Contacts Inc. and Clearly Contacts Ltd.*, 2009 BCCA 459, 98 B.C.L.R. (4th) 53, at paras. 28 and 30.
- b. present “compelling evidence” that an injunction is warranted. See *Newcastle Recycling v. Clarington*, 2005 CanLII 46384 (Ont. C.A.), at para. 32.

Analysis

There Has Been a Clear Breach of the Stage 1 Regulation (82/20)

[22] The respondents were charged with over 20 provincial offences between November 24 and 27, 2020 in relation to violations of the ROA, the HPPA and the *Toronto Municipal Code*.

[23] The Etobicoke restaurant continued to offer indoor and patio dining in defiance of the Stage 1 Regulation from November 24, 2020 until the premises were boarded up and secured by police on November 27, 2020. Furthermore, the Stage 1 control measures were not implemented or enforced by persons responsible for the restaurant business operating at this location, in contravention of the Stage 1 Regulation. Various orders made by the medical officer of health under s. 22 of the HPPA were also openly disregarded at this location.

[24] Adamson Barbecue announced on social media on November 23, 2020 that “Starting Tuesday, November 24th, the Adamson Barbecue Etobicoke location will be open for dine-in service” and re-affirmed on November 25, 2020, “We’re not closing.” After charges were laid, the social media messaging remained unchanged: “Etobicoke location will continue to open for lunch! Dine-in, take-out or patio. Tuesday to Sunday from 11 am.” Even after being locked out of the Etobicoke restaurant on November 26, 2020, the respondents broke in and continued to offer indoor dining services.

[25] It is incontrovertible that there has been a clear breach of the ROA Stage 1 Regulation at the Adamson Barbecue restaurant Etobicoke location. The Stage 1 control measures were not being adhered to and no persons responsible for the business were attempting to ensure compliance.

[26] Section 9 of the ROA provides that the contravention by any person of a continued section 7.0.2 order may be restrained. Section 9 does not require the breach to be continuing or ongoing at the time the injunction is granted. To do so would defeat the purpose of the ROA that is preventative in nature. The restraint is of the contravention. The respondents’ intention to defy the Stage 1 Regulation has been made clear and is based on their ideological opposition to it. The past actions of the respondents demonstrate a clear breach of breach of a continued s.7.0.2 order and their express

intentions are an added justification for restraining the future contravention of the continued section 7.0.2 order under s. 9.

[27] Section 9 of the ROA is an additional tool, over and above other legislative and non-legislative recourse, to ensure compliance with the ROA, providing for the issuance of a restraining order “[d]espite any other remedy or penalty” available. The Crown is not required to demonstrate that other remedies have proven to be ineffective, although that has been established here. The open defiance of the Stage 1 Regulation and the various enforcement efforts of the medical officer of health under the HPPA, and apparent lack of any deterrent effect of the charges and penalties faced as a result of that defiance, makes this an exemplary case for s. 9 injunctive relief.

[28] Some courts in Ontario and British Columbia have allowed respondents opposing the grant of a statutory injunction to answer the applicant’s contention of a clear breach by showing an “arguable case” or “arguable defence” as to why they are not in breach. See *DiBlasi*, at para. 63; *Saanich (District) v. Island Berry Co.*, 2008 BCSC 614, 82 B.C.L.R. (4th) 390, at para. 12.

[29] The Crown argues that those cases are distinguishable from this one on various grounds but, in any event, the flagrant, intentional and blatant defiance of the Stage 1 Regulation, recorded in public statements on social media, renders any prospect of an arguable defence academic in this case.

[30] The onus of raising an arguable defence, if available, is on the respondents. They have been told that they will have the opportunity to bring a motion to vary or discharge any injunction that is granted at a come-back hearing. They will bear the onus of overcoming the finding of the clear breaches of the Stage 1 Regulation if they seek to argue at the come-back hearing that they have an arguable defence. The Crown will be at liberty to argue that this is not an available answer in the circumstances of this case.

[31] It is not a defence for a respondent to state that their contravention is in pursuit of delivering an important message to the public: see *Zhang*, at para. 20. Counsel for the respondents characterize their conduct as an act of civil disobedience to challenge the legislation. This court does not condone civil disobedience of public health and welfare regulations.

[32] The respondents did not challenge the constitutionality, validity, necessity or policies underlying the Stage 1 Regulation at the hearing before me on December 4, 2020. They say that they are considering whether to do so. For immediate purposes, the court is in a similar position to what was observed in *Downing*, at paras. 89-90:

As the Ontario Court of Appeal stated in *R. v. Schmidt*:

... However, provided that the legislature has acted within the limits imposed by the constitution, the legislature’s decision to ban the sale and distribution of unpasteurized milk to protect and

promote the public health in Ontario is one that must be respected by this court.

The question of whether either or both statutes violate one or more Ontarians of a constitutionally protected right or freedom is not before this court.

[33] No arguable defence was raised that could detract from my finding that there has been a clear breach of the Stage 1 Regulation for purposes of the injunction I granted on December 4, 2020.

No Exceptional Circumstances

[34] If a clear breach of an enactment has been established, the court has residual discretion to refuse to grant the injunction in “exceptional circumstances”. These circumstances, outlined in *Downing* at para. 113, may include:

- a. The offending party has ceased the activity and/or has provided clear and unequivocal evidence that the unlawful conduct will cease;
- b. The injunction is moot and would serve no purpose;
- c. There is a right that pre-existed the enactment that was breached;
- d. There is uncertainty regarding whether the offending party is flouting the law;
- e. The conduct at issue is not the type of conduct that the enactment was intended to prevent.

[35] The court in *Zhang*, at para. 19, described the relevant factors to consider in the exercise of the court’s discretion to refuse an injunction to enforce public rights slightly differently to include:

...the willingness of the party to refrain from the unlawful act; the fact that there may not be a clear case of “flouting” the law because the party has ceased the unlawful activity; and whether there is an absence of proof that the activity was related to the mischief the statute was designed to address: *British Columbia (Minister of Environment, Lands & Parks) v. Alpha Manufacturing Inc.* (1997), 1997 CanLII 4598 (BC CA), 150 D.L.R. (4th) 193, 96 B.C.A.C. 193.

[36] The onus and exceptional nature of this residual discretion was emphasised by Perell J. in *College of Physicians and Surgeons of Ontario*, 2018 ONSC 4815, at para. 43:

Where a public authority applies to the court to enforce legislation, and a clear breach of the legislation is established, only in exceptional circumstances will the court refuse an injunction to restrain the continued breach. The onus to raise the exceptional circumstances lies with the respondent, and those circumstances are limited; for example, to where there was a right that pre-existed the enactment contravened or where the events do not give rise to the mischief the enactment was intended to preclude.

[37] The respondents have not attempted at this stage to demonstrate any exceptional circumstances. The Crown appropriately raised them for my consideration since I had directed that the application proceed as if it was *ex parte*. While they are not all relevant in this case, I will address the types of exceptional circumstances that have been considered in other cases briefly, in turn. I am satisfied that none of them would cause me to exercise my residual discretion to refuse to grant the restraining order in this case:

- a. The respondents have not demonstrated a willingness to voluntarily cease or refrain from their offending activities. The breaches of the Stage 1 Regulation at the Etobicoke Adamson Barbecue location only stopped when the police forcibly took control of, secured and surrounded the premises. That was not voluntary. Nor are the bail conditions for Mr. Skelly, which cover some but not all of the offending activities, voluntary or permanent. The respondents have not provided any indication that their activities in breach of the Stage 1 Regulation will cease; their past conduct and statements are to the contrary.
- b. As long as Regulation 82/30 and Ontario's Response Framework to the COVID-19 pandemic remain in place, the injunction cannot be said to be moot. This Framework requires compliance with the control measures applicable to whichever stage the Adamson Barbecue locations in Ontario have been designated under Regulation 82/20, which may change from time to time.
- c. This is not a case about a pre-existing right that was breached.
- d. There is no uncertainty about the respondents' flouting of the Stage 1 Regulation – their social media statements are clear and unequivocal; their own lawyer describes their conduct as acts of civil disobedience.

- e. Disregarding the Stage 1 control measures is precisely the conduct that the ROA and Stage 1 Regulation was intended to prevent. More importantly, the spread of COVID-19 is the harm the Stage 1 Regulation is attempting to prevent and disregarding the Stage 1 Control Measures undermines that objective. The Crown argues that proof of the spread of COVID-19 from these breaches is not required; rather it can be inferred that there were transmissions of COVID-19, given the crowds of people who attended the Etobicoke Adamson Barbecue location on November 24, 25, 26 and 27, 2020 and that most were observed not to be wearing masks or keeping 2 metres apart, contrary to all municipal, Provincial and Federal public health directives. I am satisfied that at least the risk of transmission was increased by this conduct, and that is the harm that the Stage 1 Regulation is intended to prevent.

[38] The public health objectives of both the ROA and the HPPA are clear and obvious.

[39] There is evidence in the record before me about the epidemiological and other bases for the Stage 1 Regulation under the ROA. Many of the charges laid were as a result of, or in conjunction with, the respondents' failure to comply with orders and directions made under ss. 22 and 24 of the HPPA. A medical officer of health can only make such orders and directions based on a medical opinion that there is a health risk due to a communicable disease necessitating the specified requirements, which were ignored by the respondents in this case.

[40] In considering whether to grant a statutory injunction under public welfare legislation, the court is mandated to give a broad and purposeful statutory interpretation that facilitates the intention and purpose of the legislation. See *Downing*, at para. 100.

[41] I have no hesitation in granting the injunction in this case, having regard to the public health objectives of the ROA.

The Order Granted

[42] On December 4, 2020 I signed an order pursuant to s. 9 of the ROA, restraining the respondents and any other corporation under their control or direction (including Adamson Bar-B-Que Limited), their servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or who has or assumes responsibility for all or part of any business carried on by them in the Province of Ontario, from directly or indirectly, by any means whatsoever, contravening Ontario Regulation 82/20 at any restaurant owned or operated by one or both of the respondents or any corporation under their control or direction (including Adamson Bar-B-Que Limited) that is subject to Ontario Regulation 82/20.

[43] The Stage 1 Regulation places the responsibility on those persons responsible for a business, or part of a business, to ensure that the Stage 1 control measures are complied

with. The Adamson Barbecue restaurants operate through other individuals, beyond Mr. Skelly. The regulation extends to the class of persons responsible for the business and my injunction extends to that same class of prospective persons who may be responsible for any part of the business carried on at the Adamson Barbecue restaurants. The Crown sought a broader order that could have been read to extend to patrons of the restaurants, which I was not persuaded was justified or supported by the language of the regulation.

[44] The come-back hearing will be scheduled if, and after, the respondents deliver a notice of motion to vary or discharge the restraining order that I granted on December 4, 2020. The respondents had originally asked for the hearing to be held the week of December 14, 2020 to allow time for their response. At the December 4, 2020 hearing they asked for a deadline of January 15, 2021 for their notice of motion, with a hearing to be scheduled at some point thereafter. In the alternative they suggested 21 days from December 4, 2020 which landed on Christmas Eve so that was revised to December 29, 2020, the day after Boxing Day.

[45] While the injunction is in place in the meantime, I agree with the Crown that, if there is going to be a motion to vary or discharge the injunction, it needs to move forward in a timely manner. If there is to be a legal or constitutional challenge to the ROA, it is not in the public interest for that to be drawn out. Taking six weeks to prepare a notice of motion is not timely, in my view. Thus, I have directed the respondents to deliver their notice of motion by December 29, 2020, after which a hearing date and timetable will be set for their come-back motion. Both sides agree that the first step should be the delivery of a Notice of Motion so that the issues can be identified before a full briefing schedule and hearing date are set.

[46] The applicant asked for its costs. The Crown argued that this was not actually an *ex parte* motion because they had provided notice, even though the court, by an earlier endorsement, had permitted the respondents not to respond. The respondents did not oppose the relief sought (except to raise procedural objections). The Crown had an onus to meet, irrespective of any position of the respondents. If the Crown had proceeded *ex parte*, it concedes that it would not have been entitled to costs by virtue of Rule 57.03(3).

[47] Although the Crown did provide notice, the respondents' participation has been deferred until the come-back motion. I have determined that any costs that might be recoverable by the applicant for this motion should be addressed in the context of that come-back motion if it proceeds.

[48] The court's practice is to fix the costs of each step in a proceeding if possible. The applicant represented to the court that its bill of costs on a partial indemnity scale for the application amounted to \$19,675.00. I can appreciate that there was a need for three counsel on a file such as this. This amount is within the realm of expected costs for an urgent application of this nature, although perhaps a little on the high side having regard to comparable cost awards that I was directed to in contested proceedings.

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[49] In the exercise of my discretion under Rule 57 and section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, and having regard to the applicable factors, I fixed the amount of the applicant's costs of this application up to and including December 4, 2020 at \$15,000.00.

[50] An order reflecting the above was signed on December 4, 2020.

Kimmel J.

Released: December 11, 2020

CITATION: Her Majesty the Queen in Right of Ontario v. Adamson Barbecue Limited, 2020
ONSC 7679
COURT FILE NO.: CV-20-00652216-0000
DATE: 20201211

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

**HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO**

Applicant

– and –

**ADAMSON BARBECUE LIMITED AND
WILLIAM ADAMSON SKELLY**

Respondents

**REASONS FOR DECISION
– RESTRAINING ORDER**

Kimmel J.

Released: December 11, 2020

CITATION: Retirement Homes Regulatory Authority v. In Touch Retirement Living for Vegetarians/Vegans Inc., 2019 ONSC 3401

COURT FILE NO.: CV-19-618012 & CV-19-620798

DATE: 20190603

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Retirement Homes Regulatory Authority, Applicant

AND:

In Touch Retirement Living for Vegetarians/Vegans Inc. and Elaine Lindo,
Respondents

BEFORE: Nishikawa J.

COUNSEL: *Jordan Glick and Jordan Stone*, for the Applicant

Oswald Barnwell, for the Respondents

HEARD: May 31, 2019

ENDORSEMENT

Overview

[1] The Retirement Homes Regulatory Authority (the “RHRA”) brings this Application (the “Application”) on an urgent basis for an order directing the Respondents, In-Touch Retirement Living for Vegetarians/Vegans Inc. (“In-Touch”) and Elaine Lindo (together, the “Respondents”) to cease operating as an unlicensed retirement home.

[2] The Application is brought pursuant to s. 96.1 of the *Retirement Homes Act, 2010*, S.O. 2010, c. 11 (the “Act”). The RHRA alleges that the Respondents have failed to comply with the requirements of the Act and various orders made by the Registrar of the RHRA to cease operating. The RHRA has serious concerns about the safety and well-being of the residents of In-Touch, based on the Respondents’ history of non-compliance and the upcoming sentencing of Ms. Lindo, as further detailed below.

[3] For the reasons that follow, I grant the RHRA’s Application and order the requested relief.

Preliminary Matters

[4] The Respondents have commenced a cross-application against the RHRA (Court File No. CV-19-620798) seeking a declaration that the enforcement of s. 89 of the Act on the facts of this case violates ss. 2(a) and (b) of the *Charter of Rights and Freedoms*, and an order requiring the

RHRA to “reasonably consider” In-Touch’s application for a licence (the “Cross-Application”). In support of its Cross-Application, and in opposition to the RHRA’s Application, the Respondents seek to admit the affidavit and expert report of Dr. Gloria Fiati (the “Fiati Report”).

[5] The RHRA objects on the basis that, among other things, it has not had the opportunity to respond, since the Cross-Application and the Fiati Report were not served until two days before the hearing of this Application, on May 29, 2019. A Notice of Constitutional Question was served on the Attorney General of Canada and the Attorney General of Ontario on the same date.

[6] The Respondents did not seek to adjourn the hearing of the Application but instead argued that both the Application and the Cross-Application ought to be heard. I heard the Respondents’ arguments on both the Application and Cross-Application, but deferred my ruling on the issue.

The Cross-Application

[7] A Notice of Application must be served at least 10 days before the hearing of the application, and the application record must be filed with the court at least seven days before the hearing: rr. 38.06(3) and 38.09(1), *Rules of Civil Procedure*, R.R.O., Reg. 194 (the “Rules”). The Respondents have had notice of the Application since April 17, 2019, but did not serve the Cross-Application until two days before this hearing. The Respondents did not advise of their intention to bring a Cross-Application until May 25, 2019.

[8] The Respondents’ Notice of Constitutional Question was not served on the Attorney General of Canada and the Attorney General of Ontario within the time required under s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Moreover, it was served and filed in the Application, when it should have been served and filed on the Cross-Application. While counsel for the Attorney General of Canada advised that they would not be taking a position, counsel for the Attorney General of Ontario has informed the parties that they do not yet have instructions.

[9] The timelines provided by the Rules and the *Courts of Justice Act* are not merely technical, but ensure that matters are adjudicated fairly and on their merits. This requires that all parties have sufficient time to respond. In this case, serving the Cross-Application and Notice of Constitutional Question two days before the hearing left little or no time for the RHRA and the Attorney General to respond. The Court has only one-sided evidence and submissions on the *Charter* issues raised by the Respondents.

[10] As the *Charter* argument was raised with insufficient notice to the Applicant and the Attorneys General, I would normally have adjourned the Cross-Application. Under the circumstances, however, given the urgency of the Application and the interest in addressing all issues raised by the Application and Cross-Application, I have considered it without the benefit of a responding record from the Applicant. I find that the *Charter* argument does not assist Ms. Lindo, and she is not entitled to the relief sought in the Cross-Application.

[11] When asked to particularize Ms. Lindo’s ss. 2(a) and 2(b) *Charter* claims, her counsel was unable to articulate specifically how the enforcement of s. 89 of the Act infringes upon her

Charter right to freedom of conscience and expression. Ms. Lindo's position is that she "followed her conscience that she was outside of the RHRA's mandate" and that she needed to continue to operate an unlicensed retirement home "to satisfy her soul." From this, I understand Ms. Lindo's position to be that her freedom of conscience, that takes the form of her deeply-held commitment to assisting the homeless and other vulnerable individuals, protects her from strict compliance with the Act and the enforcement activities of the RHRA.

[12] The courts have held, in the context of s. 7 of the *Charter*, that there is no constitutional right to practise a profession unfettered by the applicable rules and standards which regulate that profession. Any infringement would be of an economic interest which is not protected by the *Charter*. See, *Mussani v. College of Physicians and Surgeons* (2004), 74 O.R. (3d) 1 (C.A.), at paras. 39-43. More recently, in *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons*, 2019 ONCA 393, the Court of Appeal upheld, under s. 1 of the *Charter*, policies requiring physicians who object to providing certain medical procedures or pharmaceuticals on the basis of religion or conscience to provide the patient with an "effective referral." In doing so, the Court found that the physicians "had no common law, proprietary or constitutional right to practice medicine. As members of a regulated and publicly-funded profession, they are subject to requirements that focus on the public interest, rather than their interests." (at para. 187).

[13] Similarly, Ms. Lindo has no *Charter* protected right to continue to operate an unlicensed retirement home. The Respondents cite no authority to support their position that her freedom of conscience and religion would permit her to defy the licensing requirements of the Act, or the substantive provisions in place to protect the dignity, safety and well-being of the Residents.

[14] I note that the Respondents' Application Record on the Cross-Application, and its Notice of Constitutional Question bear the wrong court file number (CV-19-618012) and should be re-filed under the correct one (CV-19-620798).

The Fiati Report

[15] The Fiati Report is not admitted as evidence on this Application or the Cross-Application. The Fiati Report does not comply with the requirements for expert evidence under r. 53.03(2.1). The Report does not contain Dr. Fiati's employment and educational experience; the instructions provided to her in relation to the proceeding; or the nature of the opinion being sought and each issue in the proceeding to which the opinion relates: rr. 39.01(7) and 53.03(2.1). The Fiati Report is not admissible under s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23, which requires leave of the court and 10 days' notice to the parties.

[16] In addition, Dr. Fiati's affidavit was delivered after cross-examinations were conducted, contrary to r. 39.02(2), and the RHRA had no opportunity to cross-examine Dr. Fiati. Moreover, the consent timetable order of Firestone J. provided the dates by which affidavits were to be delivered. To admit the Fiati Report would unduly prejudice the RHRA, which has not had the opportunity to respond.

[17] In the event that I am mistaken, and if the Fiati Report were to be admitted as evidence, it would not alter my conclusions. The Fiati Report describes the impact of the RHRA's enforcement activities on Ms. Lindo and her personal motivation for her failure to comply with the Act. These matters are not relevant to the issue in the Application, which is whether the Respondents should be required to cease operating as a retirement home. Nor would the Fiati Report provide a basis to order the relief sought in the Cross-Application.

Factual Background

The Parties

[18] The Applicant, the RHRA, is the regulatory body with exclusive power to license and regulate retirement homes in Ontario under the Act and the regulations thereunder.

[19] The Respondent, In-Touch, is a corporation incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16. In-Touch operates a two-floor brick house in Toronto and offers care and accommodation to approximately 10-15 persons, most of whom are over the age of 65.

[20] The Respondent, Elaine Lindo, is the President and sole director of In-Touch. Ms. Lindo was a licensed nurse in England for ten years before coming to Canada. In Ontario, Ms. Lindo has worked as a nurse's assistant, caregiver, and part-time teacher at the George Brown College School of Culinary Arts. For a number of years, Ms. Lindo has helped provide meals to the homeless on a weekly basis with her church group.

[21] Based on the available information relating to the residents of In-Touch (the "Residents"), there are at least ten and likely eleven Residents over the age of 65. Several of the Residents have cognitive impairments, such as psychosis, schizophrenia or dementia, and many of them require assistance with their personal care. The Residents are not named as parties to this Application. Their interests are nonetheless central to the issues to be determined. Further to Firestone J.'s timetable order, the RHRA confirmed service of notice of the hearing on nine residents and six substitute decision-makers and/or family contacts. The son of one resident attended the hearing. The Public Guardian and Trustee was also provided with notice of the Application and hearing.

The Regulatory Framework

[22] The overarching purpose of the Act and its regulations is reflected in the "fundamental principle" in s. 1 of the Act, which provides as follows:

The fundamental principle to be applied in the interpretation of this Act and any regulation, order or other document made under this Act is that a retirement home is to be operated so that it is a place where residents live with dignity, respect, privacy and autonomy, in security, safety and comfort and can make informed choice about their care options.

[23] The objects of the RHRA are set out in s. 16 of the *Act* and include administering the *Act* and the regulations, including overseeing their enforcement, for the purpose of ensuring that retirement homes are operated in accordance with the *Act* and the regulations.

[24] A “retirement home” is defined in s. 2(1) of the *Act* to mean a residential complex or the part of a residential complex:

- (a) that is occupied primarily by persons who are 65 years of age or older;
- (b) that is occupied or intended to be occupied by a prescribed number of persons who are not related to the operators of the home, which, pursuant to O. Reg. 166/11, s. 3(1) is six persons; and
- (c) where the operator of the home makes at least two care services available, directly or indirectly, to the residents.

[25] The following services are defined as a “care service” under s. 2(1) of the *Act* or s. 2(1) of O. Reg 166/11:

- (a) a prescribed health care service provided by a member of a College as defined in the *Regulated Health Professions Act, 1991*;
- (b) administration of a drug, as defined in the *Drug and Pharmacies Regulation Act*, or another substance;
- (c) assistance with feeding;
- (d) assistance with bathing;
- (e) continence care;
- (f) assistance with dressing;
- (g) assistance with personal hygiene;
- (h) assistance with ambulation;
- (i) provision of a meal;
- (j) any service that a member of the College of Physicians and Surgeons of Ontario provides while engaging in the practice of medicine;
- (k) any service that a member of the College of Nurses of Ontario provides while engaging in the practice of nursing;
- (l) any service that a member of the Ontario College of Pharmacists provides while engaging in the practice of pharmacy;

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- (m) the provision of a dementia care program; and
- (n) the provision of a skin and wound care program.

[26] The *Act* contains care and safety standards that apply to all licensees. These standards relate to areas such as training, prevention of abuse and neglect, risk of falls, emergency plans, and the control of dangerous resident behaviours. The *Act* also includes standards that apply to specific care services, for example, administration of drugs, skin and wound care, and dementia care. However, these requirements can only be enforced against licensed retirement homes.

[27] Subsection 33(1) prohibits the operation of a retirement home without a licence issued under the *Act*. When a person applies for a licence to operate a retirement home, the Registrar of the RHRA has a statutory duty to determine whether a licence should be granted in accordance with the criteria set forth in s. 35 of the *Act*. Where a licence is not granted, it is illegal to operate a retirement home as defined in the *Act*.

[28] There are four primary ways in which the *Act* allows the RHRA to seek to remedy non-compliance with respect to the operation of an unlicensed retirement home:

- (i) Under s. 89 of the *Act*, the Registrar may order a person to apply for a licence and/or cease operating as a retirement home;
- (ii) Under s. 93 of the *Act*, the Registrar may order a person who is believed to have contravened the *Act* to pay an administrative penalty;
- (iii) Under ss. 98(2)(1) and 99(1) of the *Act*, it is an offence to operate an unlicensed home, and that offence may be prosecuted under Part III of the *Provincial Offences Act*, R.S.O. 1990, c. P.33; and,
- (iv) Under s. 96.1 of the *Act*, the Registrar may apply to the Superior Court of Justice for an order directing a person to comply with the *Act*, regulations, or an order made under the *Act*.

In-Touch's Operations

[29] In 2006, Ms. Lindo purchased a rooming house at 64 King Street, Toronto in 2006 (the "Property"). She began to operate it through In-Touch as a residence for seniors and homeless people.

[30] On July 3, 2012, In-Touch applied for a licence to operate a retirement home. On July 17, 2013, the Registrar issued a Notice of Decision to Refuse a Licence for In-Touch, concluding that the Respondents did not meet the licensing criteria in s. 35 of the *Act*.

[31] In-Touch appealed the Registrar's decision to the Licence Appeals Tribunal (the "LAT"). The LAT affirmed the Registrar's decision to refuse a licence to In-Touch. In doing so, the LAT found neglect of one resident and a lack of fire and training policies, among other things.

[32] After the LAT decision, In-Touch, through its counsel, advised the RHRA that it would be converting the Property into a rooming house. The RHRA subsequently requested information from In-Touch about the steps being taken to cease operating as a retirement home, but no information was provided.

Ms. Lindo is Charged Under the Act

[33] On April 2, 2014, RHRA investigators executed a search warrant at In-Touch and concluded that Ms. Lindo was continuing to operate In-Touch as a retirement home. On May 15, 2014, Ms. Lindo was charged with the offence of operating a retirement home without a licence, in breach of s. 33 of the Act. On March 15, 2015, Ms. Lindo was found guilty of operating a retirement home without a licence and was sentenced to 15 days imprisonment, a fine of \$2,500 and a two-year probation order. The probation order required, among other things, that Ms. Lindo not commit the same offence or any related or similar offence, not admit anyone over the age of 65 to In-Touch and to provide the RHRA with monthly reports setting out information with respect to In-Touch.

[34] On December 1, 2016, RHRA investigators executed a search warrant and found that In-Touch continued to operate an unlicensed retirement home. On December 12, 2016, the RHRA again charged the Respondents for operating without a licence and with three counts of breach of probation. On January 24, 2019, Ms. Lindo was found guilty of operating an unlicensed retirement home and three counts of breach of probation. The sentencing was adjourned to June 10, 2019.

[35] One of the reasons for the RHRA's urgent application is the concern that Ms. Lindo may face a term of imprisonment when she is sentenced on June 10, 2019. On cross-examination, Ms. Lindo would state only that there are two managers and five personal support workers at In-Touch and that the residents would be "well taken care of" if she is incarcerated. She refused to answer questions about In-Touch's finances and whether anyone would be able to access In-Touch's bank accounts to continue to care for the residents.

The Registrar Issues Orders Under the Act

[36] In the meantime, as a result of the various inspections, the Registrar also served Ms. Lindo and In-Touch with various orders under the Act. The RHRA's orders are listed below, with any appeal or outcome noted in parentheses:

- November 7, 2014 order under s. 89 of the Act requiring In-Touch to cease operating as a retirement home (no appeal);
- December 10, 2014 order under s. 93 of the Act requiring that Ms. Lindo and In-Touch pay a \$10,000 administrative penalty for operating without a licence (appeal withdrawn);
- December 9, 2016 order under s. 89 of the Act to cease to operating as a retirement home (no appeal);

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- December 9, 2016 order under s. 93 of the Act to pay a \$10,000 administrative penalty for operating an unlicensed retirement home (paid after writ of seizure and sale registered on the Property);
- July 18, 2017 order under s. 93 of the Act to pay a \$10,000 administrative penalty for operating an unlicensed retirement home (paid after writ of seizure and sale registered on the Property);
- September 21, 2018 order to cease operating the Property as an unlicensed retirement home (appeal to the LAT withdrawn).

[37] Between November 2015 and April 2019, In-Touch has been inspected by the RHRA eighteen times. On each occasion, RHRA inspectors concluded that In-Touch was operating as an unlicensed retirement home as defined by the Act.

[38] At a further inspection conducted on April 3, 2019, RHRA inspectors confirmed that In-Touch had at least ten residents over the age of 65. At that time, Ms. Lindo informed the RHRA inspector that In-Touch has fourteen residents, eleven of whom were over the age of 65. RHRA inspectors further confirmed that well over two care services were being provided to residents, including provision of a meal; administration of a drug; continence care; assistance with dressing, ambulation and bathing; and a prescribed healthcare service provided by a member of a College, as defined in the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.

[39] The evidence of the RHRA inspectors is that at each inspection, Ms. Lindo denied operating a retirement home. She refused to provide requested information to the inspectors. When the inspectors attempted to speak to residents of In-Touch, Ms. Lindo interrupted or remained present, and the residents would not speak to the inspectors.

[40] Since the commencement of this Application, Ms. Lindo now appears to acknowledge that she is operating a retirement home and has included an application for a licence under the Act as an exhibit to her affidavit.

Issues

[41] The Application raises the following issues:

- (i) Should a compliance order be granted?
- (ii) Should this Court order further ancillary relief requested by the Applicant?

Analysis

Should A Compliance Order Be Granted?

The Test for a Compliance Order

[42] Section 96.1 of the Act states:

The Registrar may apply to the Superior Court of Justice for an order directing a person to comply with a provision of this Act or the regulations or an order made under this Act and, upon the application, the court may make any order that the court thinks fit.

[43] Counsel for the RHRA advises that the only order granted under this provision since it came into force in December 2017 was on consent. As a result, this is a matter of first impression.

[44] The RHRA submits that this Court can look to analogous provisions in similar regulatory statutes for guidance as to the appropriate test to apply. For example, s. 87 of the *Health Professions Procedural Code*, Sched. 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (the “Code”), provides:

The College may apply to the Superior Court of Justice for an order directing a person to comply with a provision of the health profession act, this Code, the *Regulated Health Professions Act*, the regulations under those Acts or the by-laws...

[45] This Court has held that under s. 87, a College must establish that: (a) there has been a continued breach of the statute by the person against whom the relief is sought; and (b) the statute permits the Court to make an order against that person: *College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Traditional Chinese Medicine Association*, 2015 ONSC 661, at para. 67; *College of Physicians and Surgeons of Ontario*, 2018 ONSC 4815, at para. 39.

[46] Based on the similarity between the provisions above, and the fact that the Act is public welfare legislation, as evidenced by the fundamental principle in s. 1 of the Act, I agree that it would be appropriate to apply the test articulated and applied by this Court in relation to the *Regulated Health Professions Act*.

[47] Moreover, where an injunction is authorized by statute, different considerations apply than where an injunction is sought at common law. Where a statutory injunction is sought:

- (a) The Court’s discretion is more fettered, and the factors considered by a court when considering equitable relief will have more limited application;

- (b) An applicant will not have to prove that damages are inadequate or that irreparable harm will result if the injunction is refused;
- (c) Proof of damages or proof of harm to the public is not an element of the legal test;
- (d) There is no need for other enforcement remedies to have been pursued;
- (e) The Court retains a discretion as to whether to grant injunctive relief. Hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed. However, an injunction will not issue where it would be of questionable utility or inequitable; and
- (f) It remains more difficult to obtain a mandatory injunction.

CPSO, at paras. 41-42.

[48] As stated by Perell J. in *CPSO*, at para. 43:

Where a public authority applies to the court to enforce legislation, and a clear breach of the legislation is established, only in exceptional circumstances will the court refuse an injunction to restrain the continued breach. The onus to raise the exceptional circumstances lies with the respondent, and those circumstances are limited; for example, to where there was a right that pre-existed the enactment contravened or where the events do not give rise to the mischief the enactment was intended to preclude.

[49] Further, in *College of Opticians of Ontario v. City Optical Inc.*, [2009] O.J. No. 2200 (S.C.), at para. 55, Roberts J. (as she then was) held that it is no defence for a person who is not lawfully authorized to perform a controlled act to argue that they are equally competent or capable as a person who is authorized to do so.

Has the RHRA Met the Test for a Compliance Order?

[50] Based on the evidence before me, there is no question that there has been a continued breach of the Act by the Respondents. The Respondents have continuously operated a retirement home over the past six years without a licence.

[51] Since it was refused a licence, In-Touch has continued to operate illegally. Multiple inspections by the RHRA have revealed that, despite Ms. Lindo's denials, In-Touch was operating as a retirement home within the definition of the Act. The inspections have led to three orders to cease operating and fines totaling \$30,000. Ms. Lindo was convicted twice for operating an unlicensed retirement home. The Respondents now concede that they have been operating a retirement home, in breach of the Act.

[52] Section 96.1 allows this Court to make an "order directing a person to comply with a provision of this Act or the regulations or an order made under this Act." The RHRA seeks an

order directing the Respondents to comply with s. 33 of the Act, which states that no person shall operate a retirement home unless the person is licensed under the Act to operate that specific home. The RHRA also seeks an order directing the Respondents to comply with the Registrar's orders that the Respondents cease operating the Property as an unlicensed retirement home, made under s. 89 of the Act.

[53] As noted above, the Applicant need not demonstrate harm to the public or to specific persons to obtain the order sought. In any event, there is ample evidence of harm and a risk of further harm if the Respondents are permitted to continue to operate. The following is a summary of the factual circumstances that give rise to serious concerns about the safety and welfare of the Residents:

- A resident of In-Touch who suffered from dementia wandered off in March 2019 and was reported missing to the police by Ms. Lindo. The resident was found dead several days later. The same individual had wandered from the Property on two previous occasions. While Ms. Lindo explains that the resident left In-Touch accompanied by friends who were supposed to bring him back to In-Touch, the incident is indicative of an absence of the necessary safeguards for residents suffering from dementia or similar impairments;
- Complaints were made in March 2019 by an In-Touch resident of verbal abuse by Ms. Lindo and a refusal to provide meals;
- There is currently a bed bug infestation at In-Touch, although Ms. Lindo states that it is being addressed;
- Toronto Fire Services have issued an order requiring the installation of a sprinkler system by May 13, 2019, and Ms. Lindo acknowledges that work is necessary to fix faulty electrical work; and
- Ms. Lindo claims to be impecunious and will be sentenced on June 10, 2019, and there is no evidence of a contingency plan for the continued care of the Residents.

[54] As Roberts J. found in *City Optical*, the Respondents' failure to recognize that their practices and procedures were not in compliance with the statutory framework, "created exactly the risk of harm to the public envisaged by" the statutory framework: at para. 56. Here as well, the Respondents' record of non-compliance with the requirements of the Act raise concerns about both the Respondents' competence and willingness to operate in a lawful manner, and their understanding of the serious consequences to the Residents of their failure to do so.

Have The Respondents Demonstrated Exceptional Circumstances?

[55] The Respondents have failed to demonstrate exceptional circumstances that would justify this Court refusing to restrain the Respondents' continued breach of the Act. As noted above, the

exceptional circumstances are limited, and hardship to the Respondents does not outweigh the public interest in having the law obeyed.

[56] The Respondents' main argument is that the RHRA targeted In-Touch and treated Ms. Lindo in an unfair and heavy-handed manner. The Respondents submit that at no time did the RHRA "sit Ms. Lindo down" and tell her what to do to come into compliance with the Act. First, the Respondents have not identified any such obligation on the part of the RHRA in the Act, nor does one exist. A person or entity that conducts business in a regulated field, such as operating a retirement home, must inform themselves about the requirements of the Act and applicable regulations and ensure that they comply. Second, the evidence demonstrates that Ms. Lindo repeatedly challenged the RHRA's authority over In-Touch on the basis that she was not operating a retirement home. With the exception of In-Touch's initial unsuccessful application, it was only after this proceeding was commenced that Ms. Lindo acknowledged that she needs to obtain a licence to operate a retirement home. For the past six years, she has disregarded the requirements of the Act and defied numerous orders against her. Third, based on Ms. Lindo's non-cooperation and refusals to provide information requested by the RHRA, the inspectors had no reason to believe that "sitting her down" was a realistic option.

[57] The Respondents' factum submits that the RHRA discriminated against Ms. Lindo on the basis of her race. This argument was not raised in oral argument, and I note that there is no mention of racist or discriminatory treatment in Ms. Lindo's affidavit in opposition to the Application. Moreover, the Respondents have adduced no evidence of the RHRA's treatment of other unlicensed retirement home operators. Other than to allege discriminatory treatment, the Respondents have failed to adduce any evidence to support the claim that Ms. Lindo has been treated differently from other unlicensed retirement home operators based on her race.

The Residents

[58] As noted above, Robert Emerson, the son of one of the Residents, was present at the hearing. As none of the Residents responded or appeared on the Application, I allowed Mr. Barnwell, with Mr. Emerson's consent, to read an email sent by Mr. Emerson to both parties' counsel earlier in the day. Mr. Emerson expressed his view that public resources would be better spent helping In-Touch comply with the Act rather than prosecuting Ms. Lindo and shutting In-Touch down. Mr. Emerson sees Ms. Lindo as someone who should not be punished for trying to do a public good. I acknowledge this perspective. However, I find that it does not give rise to exceptional circumstances that would justify refusing to grant an order under the Act.

The Respondents' Charter Argument

[59] Finally, the Respondents argued that Ms. Lindo's conduct was motivated by her spiritual beliefs and values, and that she did not intend to violate the Act, but was driven by her higher cause of helping the homeless. The Respondents' position is that the application of the Act must be consistent with *Charter* values. The record is bereft of any mention that it was Ms. Lindo's religious convictions that led her to repeatedly and unrelentingly fail to comply with the Act. At no time did Ms. Lindo raise her religious beliefs or seek accommodation based on religious

grounds during any of the inspections or in any of the proceedings to date, including the POA proceedings that had penal consequences. Ms. Lindo has been represented by a succession of no fewer than six lawyers. The Respondents' position is that this issue did not crystallize until after the delivery of the Fiati Report.

[60] With respect, the last-minute *Charter* argument strikes me as the latest in a succession of unconvincing, after-the-fact excuses to justify a history of non-compliance and disregard of the applicable law. The first line of defence was to deny that In-Touch was a retirement home. The next was to state that Ms. Lindo misunderstood the requirements of the Act, including the application form where she inaccurately stated that she had never been charged with an offence. This confusion and misunderstanding were also used to justify Ms. Lindo's breach of the clear terms of her probation order, which prohibited her from taking residents over the age of 65. The Respondents' continue to try to justify this by claiming that the Community Care Access Centre required that In-Touch take residents over 65 years old. More recently, the Applicant alleges, without evidence, that she was targeted on the basis of race by the RHRA. Ms. Lindo now seeks to invoke her freedom of conscience and religion to argue that "it was a matter of conscience that she did not fall under the RHRA's mandate."

[61] In the Cross-Application, the Respondents seek an order that the RHRA reasonably consider their May 7, 2019 application for a licence and provide time to comply. However, the Respondents have operated an unlicensed retirement home for six years without any indication that they would comply with the legal requirements that are in place to ensure the safety and well-being of the Residents. Circumstances at In-Touch have come to the point that their safety and well-being are at serious risk. The order requiring the installation of a sprinkler system by May 13, 2019 has not been complied with. By Ms. Lindo's own admission, this will cost \$100,000. In-Touch does not have \$5,000 to pay the licence application fee under the Act. Ms. Lindo will soon be sentenced and may face a term of imprisonment. There is no evidence of a plan or system to manage In-Touch in her absence.

[62] Moreover, on cross-examination, it became clear that certain statements in the Respondents' application are inaccurate. For example, the Respondents answered "No" in response to the question, "Has the applicant been subject to any order, tickets, or charges under the *Fire Protection and Prevention Act, 1997*?" despite the order to install a sprinkler system. Ms. Lindo also answered "No" to the questions relating to charges and convictions under the *Criminal Code*. This too is inaccurate.

[63] This is similar to the Respondents' first application for a licence in 2013, in which Ms. Lindo indicated that she had not previously been charged or convicted with a criminal offence. However, Ms. Lindo had been charged and found not guilty of assault, and was convicted for failing to comply with a recognizance order. Ms. Lindo has variously attempted to justify this inaccurate statement on the basis that someone else completed the application, that she misunderstood the difference between a charge and a conviction, and that her lawyer told her to plead guilty. The LAT found that Ms. Lindo had attempted to mislead the RHRA about her criminal conviction, and continued to attempt to mislead the LAT in her testimony about it. The

evidence does not support Ms. Lindo's position that she ought to be given time to comply, rather, it shows a continued defiance of applicable rules and requirements.

[64] There is simply no legal or factual basis upon which the Cross-Application could succeed. It is therefore dismissed.

Should Ancillary Relief Be Ordered?

[65] The RHRA seeks a range of orders to protect the Residents and ensure compliance with the Act. Section 96.1 provides the court with broad authority to "make any order that the court thinks fit[.]"

[66] This Court has interpreted a similar provision of the *Drug and Pharmacies Regulation Act*, 1990, c. H.4 as providing the authority to make orders ancillary to a compliance order: see *Ontario College of Pharmacists v. Nguyen*, 2016 ONSC 7639. In that case, the court found that it had the authority to make an ancillary order permitting the College of Pharmacists to enter the respondent's pharmacy and seize all drugs on the premises.

[67] In addition, the Court of Appeal has held that a general order to comply with a statute does not provide sufficient specificity to ensure that the legislation will be complied with: *Law Society of Upper Canada v. Chiarelli*, 2014 ONCA 391, at para. 34.

[68] In this case, the RHRA seeks an order that In-Touch be closed and its residents transferred to alternative accommodations. I agree with the RHRA's position that the *Residential Tenancies Act*, 2006, S.O. 2006, c. 17 (the "RTA"), does not preclude this Court from making an order to close In-Touch. As held by Shaw J. in *Kenora (City) v. Eikre Holdings Ltd.*, 2018 ONSC 7635, the RTA regulates the relationship between landlords and tenants, and cannot oust the jurisdiction of the Court to make orders under public interest statutes enacted to protect and promote health and safety: at paras. 63-70.

[69] The Act gives the Registrar the power to order an unlicensed retirement home to cease operating because of the public safety concerns raised by an unlicensed retirement home. The alternative, to order the Respondents to cease providing services to the Residents, is not an option, since the evidence clearly demonstrates that many Residents of In-Touch are in need of significant care services.

[70] The RHRA has provided evidence that it has had to vacate much larger retirement homes on short notice in the past, and that in those cases, families and community partners have stepped in to find new accommodations for residents. The RHRA has contacted the Local Health Integration Network and other community partners to assist in relocating the Residents. This would be a more orderly process than if In-Touch had to be suddenly vacated because Ms. Lindo is sentenced to a term of imprisonment on June 10, 2019.

[71] The RHRA seeks other ancillary relief, including that information regarding the Residents be transferred from the Respondents to the RHRA to ensure that they continue to receive the care services that they require. I am persuaded that this relief is necessary to ensure

that In-Touch cease operating as a retirement home in a manner that protects the health and safety of the Residents.

Conclusion

[72] Based on the foregoing, I grant the RHRA's Application and the orders requested by the RHRA to ensure that it is able to transfer the Residents safely and efficiently, and to ensure that the Residents continue to be provided with the necessary care services. The order is attached as Appendix 'A' to this endorsement. I will remain seized of this matter for the purposes of implementation only.

Costs

[73] Counsel for both parties submitted costs outlines at the hearing. Counsel for the RHRA's costs total \$24,929.66 on a partial indemnity basis, including disbursements and HST. Counsel for the Respondents' costs total \$33,540.00 on a partial indemnity basis, including disbursements and HST.

[74] Pursuant to the *Courts of Justice Act*, s. 131(1), the Court has broad discretion when determining the issue of costs. The overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.). Rule 57.01(1) of the Rules sets out the factors to be considered by the Court when determining the issue of costs.

[75] I have considered these factors, as well as the principle of proportionality in r. 1.01(1.1) of the Rules, while keeping in mind that the Court should seek to balance the indemnity principle with the fundamental objective of access to justice. The Application raised novel and important issues and required a thorough record. The Application proceeded on an expedited basis and was complicated by the Respondents' last minute service of the Cross-Application and Fiati Report. I am cognizant of the Respondents' position that Ms. Lindo is impecunious and that the Application raises matters of public importance.

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[76] Based on the foregoing, I fix costs of the Application on a partial indemnity basis at \$20,000.00, inclusive of disbursements and HST, payable by the Respondents.

Nishikawa J.

Date: June 3, 2019

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *College of Opticians of British Columbia v.
Coastal Contacts Inc.*,
2009 BCCA 459

Date: 20091026
Docket: CA036116

Between:

College of Opticians of British Columbia

Appellant
(Petitioner)

and

Coastal Contacts Inc. and Clearly Contacts Ltd.

Respondents
(Respondents)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Neilson

**On appeal from: Supreme Court of British Columbia, April 25, 2008
(*College of Opticians of British Columbia v. Coastal Contacts Inc.*,
2008 BCSC 617)**

Counsel for the Appellant

D. Lunny
M. Baird

Counsel for the Respondents

M. Clemens, Q.C.
J. Lawn

Place and Date of Hearing:

Vancouver, British Columbia
May 13, 2009

Place and Date of Judgment:

Vancouver, British Columbia
October 26, 2009

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Chief Justice Finch

Dissenting Reasons by:

The Honourable Mr. Justice Lowry (p. 15, para. 36.)

Reasons for Judgment of the Honourable Madam Justice Neilson:**INTRODUCTION**

[1] This is an appeal from an order of a Supreme Court judge dismissing the appellant's application pursuant to s. 52 of the *Health Professions Act*, R.S.B.C. 1996, c. 183, (the "*Act*") to enjoin the respondents from selling, dispensing, or otherwise furnishing prescription contact lenses to the public in British Columbia, in contravention of ss. 5(3) and 5(4)(c) of the *Opticians Regulation*, B.C. Reg. 487/94 (the "*Regulation*").

LEGISLATIVE AND FACTUAL BACKGROUND

[2] The appellant is the regulatory body for opticians, who are eye care professionals that specialize in the preparation, fitting, and dispensing of ophthalmic appliances, including contact lenses. It is created and governed by the *Act*, which permits the Minister of Health Services to regulate designated health professions, including opticians, by establishing health profession colleges whose duty is to protect and serve the public by superintending the practice of those professions.

[3] The *Regulation* was enacted pursuant to s. 12(2) of the *Act*, which permits the Minister to enact regulations prescribing services that may only be provided by registrants of a college. It was revised in 2008 (B.C. Reg. 287/2008), but the provisions relevant to this appeal remained substantially unchanged. These reasons accordingly refer to the *Regulation*, which was in force when the appellant's petition was filed. These are the provisions relevant to this appeal:

1. In this regulation:

...

"contact lens fitter" means an optician who is authorized under the bylaws to fill a prescription and to fit and dispense contact lenses;

...

"prescriber" means

(a) an optometrist, or

- (b) a qualified medical practitioner who prepares a prescription;
- “prescription” means the written record, prepared by a prescriber, of
 - (a) the power of a lens to correct the refractive error of an eye, and
 - (b) reading add, prisms, back vertex distance and contraindications;

...

“supervision” means, if supervision is not governed in accordance with the *Optometrists Act* or the *Medical Practitioners Act*,

...

- (b) in relation to the services described in section 5 (3), that
 - (i) a prescriber or contact lens fitter is normally on the premises, although he or she may be absent from time to time, not including holidays,
 - (ii) a prescriber supervises the fitting or dispensing of contact lenses by a person other than a prescriber or contact lens fitter, and
 - (iii) a contact lens fitter supervises the refilling of a prescription if contact lenses are dispensed by a person other than a contact lens fitter.

...

Reserved acts

- 5(1) Subject to section 14 of the Act, no person other than an optician may
- (a) fill a prescription by dispensing eyeglasses, or
 - (b) duplicate eyeglass lenses without a prescription.
- (2) Subsection (1) does not apply to a person acting under the supervision of an optician or a prescriber provided that the measurements necessary for the manufacture of the eyeglasses or eyeglass lenses and the power described in the prescription are verified by the optician or prescriber at or before the time of final dispensing of the eyeglasses or eyeglass lenses.
- (3) Subject to section 14 of the Act, no person other than a contact lens fitter may fill a prescription by fitting and dispensing contact lenses.
- (4) Subsection (3) does not apply to a person
- (a) filling a prescription by fitting and dispensing contact lenses under supervision,
 - (b) filling a prescription by fitting and dispensing contact lenses under supervision provided that
 - (i) the person is registered in accordance with the bylaws as a student contact lens fitter, and

- (ii) the contact lens fitter is immediately present at all times, or
- (c) refilling a prescription by dispensing contact lenses under the supervision of a contact lens fitter or a prescriber provided that person does not fit the contact lenses.

[4] The respondents are affiliated companies that sell prescription contact lenses to the public, primarily through the Internet. A prospective purchaser entering the respondents' web site must first agree to a series of terms and conditions, which includes this:

VALID PRESCRIPTION REQUIRED

You hereby certify that you have a valid prescription for the contact lenses that you are ordering. You represent and warrant to us by placing an order on the Site that your information you enter into the Site is valid and true and matches exactly your prescription as provided by your eyecare provider. You further certify that you will review your prescription in strict accordance with your eyecare provider's suggested regime. You understand that we will not fulfill your order if, to our actual knowledge, you do not have a valid prescription. You hereby consent to our contacting your eyecare provider, if necessary, to verify your prescription information and any other necessary information.

[5] The terms and conditions also include these provisions with respect to limitations on the respondents' liability:

DISCLAIMERS AND LIMITATION OF LIABILITY

The Site is provided "as is" and we exclude all warranties of any kind to the fullest extent permissible by law and do not guarantee the accuracy or completeness of the Site or any information or content or that it is free of defects or viruses.

You agree that the Site, including the content, is provided free of charge. Neither we will (*sic*) be liable to you nor any person for any loss or damage of any kind which may arise from the unauthorized use of the Site and the use of any information contained within it. Furthermore we shall not be held liable for any information held on sites which may have links to or from the Site and which are not maintained and controlled by us. We will use reasonable endeavors to ensure that the Site is and stays fully operational. Due to the nature of the Internet, we cannot guarantee that the Site will be free from delays, interruptions or errors. We take all reasonable efforts to ensure that information on the Site is correct, but we cannot give representations or warranties, express or implied, in relation to the accuracy or completeness of the said information.

We take precautions to protect personal data collected through the Site but in the event that our system is infiltrated by unauthorized third parties we will not be liable for any resulting misuse of the personal data.

Any of our liability resulting from use of or visiting the Site, the delivery of defective products and/or services, will be limited to direct damages and up to the amount of the price stipulated for the items concerned. Liability for indirect damages is in all circumstances excluded.

Without prejudice to the provisions set out above, we will not be liable in the event that the damage was caused by any intentional act or omission or gross negligence by you or your improper use of the contact lenses and or related products sent to you.

The content contained in this Site is provided by us as a service to our customers. This Site does not contain information about all eye diseases, nor does this Site contain all medical information that may be relevant to your eye care needs. The information provided in this Site is only general health information, and is intended only to facilitate communication between you and your professional eye care provider. This Site does not provide medical diagnosis for any individual and must not be used as a substitute for professional medical advice, diagnosis, treatment or care. All specific medical questions you may have about your specific medical condition, treatment, care, or diagnosis must be presented to your professional eye care provider. You should never disregard medical advice or delay seeking professional advice because of any information contained in or related to this site. Except as expressly and unambiguously stated otherwise, we do not endorse, operate, control, or assume responsibility for any product, brand, method, treatment, information or service on this Site. The information, services, and products contained in this Site are provided "as is" without warranty of any kind, express or implied.

[6] Once the customer accepts those terms, he or she is directed to type onto an online form the four measurements for each eye that correspond to the measurements that must be taken by a licensed eye care professional when providing a prescription for contact lenses. The customer then chooses the desired brand of lenses and fills out an online method of payment. The process does not require the customer to produce a prescription. Nor does it verify the customer's prescription.

[7] The respondents keep an inventory of contact lenses from manufacturers. When an order is received, their warehouse employees, who are not opticians, match the customer's online specifications to the inventory, and pack and ship the stipulated lenses to the purchaser. Since January 2006, the respondents have employed a licensed optician and contact lens fitter who supervises this process by

checking the contact lenses against the information provided by the customer before they are shipped. The appellant has asked for this person's name and the respondents have declined to provide it.

[8] Three of the appellant's employees provided affidavits describing how they ordered and received contact lenses from the respondents. Ms. van Altena, an employee of the respondents' counsel, also provided affidavits about two orders for contact lenses that she submitted to the respondents.

THE REASONS OF THE CHAMBERS JUDGE

[9] The chambers judge properly defined the issue before her as the correct interpretation of ss. 5(3) and 5(4)(c) of the *Regulation*. She observed that both parties asserted that these provisions were plain and unambiguous, and that she must be guided by the modern approach to statutory interpretation adopted in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26:

In Elmer Driedger's definitive formulation, found at p.87 of his *Construction of Statutes*, (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[10] The chambers judge identified the object of the *Regulation* at paras. 35 - 36 of her reasons:

[35] ... There is no question that the object of the *Regulation* is to protect the public. This is sought to be accomplished in more than one way. One way is to ensure that only qualified persons with special training undertake certain activities, thus protecting the health and safety of the public. Another way is to ensure that in providing for qualified persons to undertake certain activities, the scope of these activities is not extended too far. This protects the public from a monopoly that is too wide, driving up costs for the consumer for matters that do not require the same degree of intervention by trained specialists.

[36] The *Regulation* seeks to carve out and define the scope of activities that require the direct involvement of a licensed optician on the one hand, or the supervisory involvement of a licensed optician on the other hand.

[11] With respect to the alleged infringement of s. 5(3), the chambers judge identified the key issue as whether the respondents' conduct amounted to filling a prescription by fitting and dispensing contact lenses. By reference to the expert evidence of Mr. Harvey Berkowitz, an optician licensed in the United States, and the *Professional Standards of Practice* promulgated by the appellant, she determined that the fitting of contact lenses involved an eye examination and some measurements of the eye. She found that the respondents had not contravened s. 5(3) as there was no evidence that they fitted the contact lenses they sold:

[39] The plain meaning of the *Regulation*, considered in the context of the object of the *Regulation*, is that when fitting of contact lenses is involved, which involves an eye examination and measurements of the eye, contact lenses cannot be dispensed except by a contact lens fitter pursuant to s. 5(3). This ensures that a qualified person is involved in the fitting of contact lenses. When fitting is not involved, a non-registered person may dispense contact lenses provided that the person is supervised by a contact lens fitter, pursuant to s. 5(4).

[40] It makes sense and is in accord with the public interest that a contact lens fitter does not need to be as directly involved in the dispensing of contact lenses once the fitting has already taken place. It is undisputed that the respondents did not engage in "fitting" the contact lenses they sold. This means they were not "filling a prescription by fitting and dispensing contact lenses," and so on the ordinary meaning of s. 5(3), they were not in contravention of the *Regulation*.

[12] With respect to the alleged infringement of s. 5(4)(c), the chambers judge found the evidence established that the respondents' employees were dispensing contact lenses under the supervision of a licensed optician and registered contact lens fitter. She rejected the appellant's argument that s. 5(4)(c) mandated that each refill of a prior prescription for contact lenses required a new examination and fitting:

[44] In my view, the *Regulation* is not capable of the meaning asserted by the petitioner. Subsection 5(4)(c) clearly contemplates a prescription being refilled and dispensed without the purchaser of the contact lenses being fitted again. However, it repeats the prohibition on any fitting by a non-registered person and it requires supervision by a registered person. Consistent with the

Regulation, there is nothing in the *Standards* that indicate that an eye examination is needed when refilling a prescription for contact lenses.

[45] The petitioner did not allege in its petition that the respondents breached s. 5(4)(c) of the *Regulation*, or that the level of supervision by the contact lens fitter was inadequate. In any event, for clarity, I conclude that the College has not made out a case that s. 5(4)(c) was contravened by the respondents.

[13] The chambers judge dealt with the appellant's argument that the respondents were in breach of the *Regulation* because they did not require prescription verification under the heading "Policy Issues". She rejected the appellant's position that an analogy could be drawn to the federal *Fairness to Contact Lens Consumers Act*, H.R. 3140, which expressly provides that American sellers of contact lenses must verify the actual prescription. She found there was no principled basis on which she could read a prescription verification requirement into the legislative scheme of this province. Nor was she convinced that the objective of public protection justified such an interpretation. She stated:

[56] The petitioner likened the sale of contact lenses over the internet, without actual documentary proof of a prescription, as akin to the sale of morphine over the internet without proof of a prescription. I do not find the comparison apt. The only risk identified on the evidence is that of a consumer making a mistake in a purchase order by incorrectly transcribing prescription information. That could lead to the consumer receiving a product that does not meet the consumer's needs, which presumably the consumer would notice as soon as he or she tried to use the contact lenses. I am not prepared to speculate on whether greater harms are likely.

[57] If the petitioner believes that a prescription verification requirement is necessary in the public interest, then it is free to work towards legislative change. Opponents might argue that such a change would create an unnecessary burden for consumers of contact lenses, drive up costs and assist members of the College in extending a monopoly over the sale of contact lenses. This debate would be up to the legislators to resolve.

ANALYSIS

[14] The scope of the appellant's argument has evolved in the course of this proceeding. Its petition alleged a breach of s. 5(3) on the basis that the respondents did not require a prescription before dispensing contact lenses, and that they did not have an optician who was a contact lens fitter on staff to fit and dispense contact

lenses. By the time the petition was heard, the appellant had learned that the respondents did employ an optician/contact lens fitter. It therefore expanded its argument to allege a breach of s. 5(4)(c) as well. Although the petition was not formally amended to reflect this, the chambers judge dealt with both arguments. The appellant did not challenge her finding that the respondents did not fit the lenses they sold, and so the focus of this appeal became whether they had contravened s. 5(4)(c). However, since s. 5(4)(c) is enacted as an exception to s. 5(3), the interpretation of s. 5(3) remains relevant.

[15] The appellant agrees that the chambers judge properly adopted the modern approach to statutory interpretation. As well, it accepts her finding that the legislative objective of the *Regulation* is to protect the public. It argues, however, that her interpretation of the *Regulation* is erroneous and inconsistent with that objective. The appellant maintains that the clear wording of the *Regulation* requires a person dispensing contact lenses to verify the customer's prescription, independent of the customer's representation, before providing the lenses. It says that the respondents' process, by which a customer provides self-reported and limited details of an unseen prescription to a dispenser that disclaims all liability for its product, amounts to no more than a system of *caveat emptor*. It argues that this is a clear breach of ss. 5(3) and 5(4)(c) of the *Regulation*, and does not accord with the objective of protecting the public.

[16] The proper construction of the *Regulation* is a question of law, and is reviewable on a standard of correctness. Whether the respondents' actions fell within the *Regulation* is a question of fact, and will only attract review if the judge made a palpable and overriding error: *Canadian Lift Truck Co. v. Deputy Minister of National Revenue* (1955), 1 D.L.R. (2d) 497 (S.C.C.); *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 10.

[17] The chambers judge found that the principles of statutory interpretation did not permit her to read a prescription verification requirement into the *Regulation*, and accordingly found that the respondents were not in breach of the legislation. Her

reasons suggest that she reached that result by comparing the *Regulation* to the American *Fairness to Contact Lens Consumers Act*, which sets out an express process for confirmation of the prescription. She does not appear, however, to have examined the definition and role of a “prescription” in the *Regulation* in reaching her conclusion. In my view, she erred in failing to do so, and in denying the injunction sought by the appellant.

[18] “Prescription” is clearly defined in the *Regulation*. It is a written record of the technical requirements for optical lenses, prepared by a prescriber. A prescriber is defined as an optometrist or qualified medical practitioner, health care professionals whose qualifications differ from those of opticians. Section 5(3) states who may fill a prescription. Section 5(4)(c) provides an exception to s. 5(3) with respect to who may refill a prescription.

[19] Thus, on the plain wording of those provisions, a person dispensing contact lenses under those subsections is filling or refilling a written record of technical specifications prepared by an optometrist or medical practitioner.

[20] The respondents do not do that. They have no written record prepared by a prescriber. Thus they have nothing to fill or refill, and accordingly cannot fill a prescription under s. 5(3) or refill it under s. 5(4)(c).

[21] The respondents argue that the customer’s certification that he or she has a prescription, and acceptance of the terms and conditions on their website, constitute sufficient compliance with the requirement for a prescription under the *Regulation*. I disagree. In my view, the fact that a prescription must be a written record implies that it must be seen by the dispenser.

[22] I find support for the view that a prescription is required under s. 5(4)(c) in the wording of ss. 4(2) and 5(1)(b) of the *Regulation*, which state explicitly that an optician may duplicate eyeglass lenses without a prescription. The maxim *expressio unius est exclusio alterius* supports an inference that the failure to provide a similar exemption with respect to the professional services covered by ss. 5(3) and (4)(c)

demonstrates a legislative intent to require a prescription before those services may be performed.

[23] Unlike the chambers judge, I find a useful analogy between the ways in which contact lenses and drugs are provided to the public. In both cases, a health care professional with different qualifications and expertise than the dispenser must prepare the prescription. The dispenser relies on that professional to prescribe the correct product, and has no ability to change the prescription. The clear inference is that the public is protected by having a properly qualified person discern the need for the product and provide written instructions about it to the dispenser. The harm that might arise from providing the product without that prescription may vary in degree, but that does not negate the objective of public protection underlying the requirement of a prescription for both optical lenses and drugs. The clear intent in both cases is that these should not be “over the counter” products.

[24] Even if one were to accept that certification of an unverified prescription and transmission of technical measurements for contact lenses from an unskilled customer could fulfill the requirement of a “prescription”, the respondents’ scheme still contravenes s. 5(4)(c) of the *Regulation*. Nothing on the respondents’ website tells the customer that the “valid prescription” they are certifying must be a written record of specifications prepared by a prescriber. To the contrary, the website advises customers that if they do not have a copy of their written prescription, they may obtain the required information for transmission from their current contact lens box. The information on a manufacturer’s box is clearly not a “prescription”. Given these circumstances, the respondents cannot rely on the customer’s certification of a valid prescription to fulfill the requirement of a prescription under the *Regulation*.

[25] The evidence shows that most of the witnesses who ordered and received contact lenses from the respondents used information from their contact lens boxes instead of from a prescription. Ms. van Altena’s two orders are instructive. In each case, she says she placed her order based on a prescription from her optometrist. Yet those prescriptions each state:

This is not a contact lens prescription. Any changes in prescription will be the sole responsibility for the ophthalmic dispenser and not that of the optometrist.

[26] Ms. van Altena says that for her first order she used information from both the prescription and her current contact lens box, but the measurements from these two sources are different, and her order form records only the information from the box. This is not explained in her evidence, but it appears clear that the information she sent to the respondents is not the same as the information from a “prescription”, as defined in the *Regulation*.

[27] Moreover, the online order form completed by customers does not differentiate between an initial order for lenses under a new prescription, and a refill of an old prescription. Without that information, it is impossible for the respondents to ensure that their activities are confined to refilling prescriptions under s. 5(4)(c). Ms. van Altena’s second order demonstrates this. Placed two months after her first order, she says that she used a new prescription obtained two weeks previously from her optometrist. Again, the information she recorded on the respondents’ form differed from that on the new prescription. She does not mention using information from an earlier contact lens box for this order. These features suggest that this was not a refill, but a new prescription. Nothing in the information that the respondents require from Ms. van Altena would alert them to that possibility.

[28] It is common ground that where an injunction is authorized by statute, the petitioner must simply demonstrate a clear breach of the law: *The College of Psychologists of British Columbia v. Utendale*, 2007 BCSC 824 at para. 60, [2007] B.C.J. No. 1257. I am satisfied that the appellant has met that onus, and has established that the respondents have breached s. 5(4)(c) by refilling prescriptions without having the required written record of specifications from the prescriber.

[29] The chambers judge, having found no breach of the *Regulation*, addressed the question of harm arising from the respondents’ practices as a policy issue, and concluded there was little risk of harm to the public. Since I have found the

respondents in breach of the *Regulation*, I approach the question of harm from a different perspective.

[30] Once a breach of a regulatory statute has been established, actual damage need not be shown. Harm to the public is presumed from the breach of the law, and the public interest in having the law obeyed ordinarily outweighs hardship to the respondent: Robert J. Sharpe, *Injunctions and Specific Performance*, 2d ed. Looseleaf (Toronto: Canada Law Book, 1992) at 3.150 - 3.160, 3.265. In *College of Opticians of Ontario v. John Doe 1 (c.o.b. Great Glasses)*, [2006] O.J. No. 5113, 154 A.C.W.S. (3d) 335 (Sup. Ct.), Spies J. expressed the principle in this manner:

[51] The assessment of irreparable harm has a special status in injunction proceedings brought by the Attorney General or other statutory authorities to enforce obligations imposed by statute. In such cases, the need to demonstrate harm is attenuated by the fact that contraventions of the law are inherently contrary to the public interest and are presumed to cause harm or create a risk of harm:

The court will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship an injunction would impose upon the defendant. It seems clear that where the Attorney General sues to restrain breach of a statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse on discretionary grounds. *Saskatchewan (Minister of the Environment) v. Redberry Development Corp.*, [1987] 4 W.W.R. 654 (Sask. Q.B.) at para. 18, aff'd [1992] 2 W.W.R. 544 (Sask. C.A.)

[31] Thus, having found the respondents in breach of the *Regulation* is sufficient to justify an order enjoining them from dispensing contact lenses under s. 5(4)(c). Nevertheless, the Court retains discretion to refuse an injunction in exceptional circumstances. In my view, several unique factors in this case militate in favour of exercising that discretion by granting the injunction sought, but suspending its operation for approximately six months, until May 1, 2010.

[32] First, the appellant has provided no evidence of actual harm to the respondents' customers arising from the respondents' practices to date. Nor have they treated this as a matter of urgency; the petition was filed over two years ago.

[33] Second, as the chambers judge noted, the object of the *Regulation* is to protect the public in two ways. First, it ensures that contact lenses are only dispensed through qualified professionals. Second, it seeks to preclude a wide monopoly that would unnecessarily drive up costs for consumers on sales that do not require significant professional intervention. In my view, Internet sales of optical lenses are consistent with that second objective. Section 6(5) of the *Regulation* entitles customers to receive copies of their prescriptions. In this age of electronic communication, the respondents may be able to devise a business model that satisfies the *Regulation*. I am persuaded they should be given an opportunity to do so, rather than be required to cease operations peremptorily.

[34] Finally, the appellant at para. 47 of its factum suggests that it is open to the respondents to seek legislative change to accommodate their business model. In my view, their business should not be shut down until they have had six months to pursue that possibility.

[35] I would accordingly allow the appeal and order that the respondents are enjoined from refilling a prescription by dispensing contact lenses pursuant to s. 5(4)(c) of the *Regulation* unless and until they are in receipt of a “prescription” as defined in s. 1 of that legislation. I would, however, suspend the operation of that injunction until May 1, 2010.

“The Honourable Madam Justice Neilson”

I AGREE:

“The Honourable Chief Justice Finch”

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[36] I have had the opportunity of reading the reasons for judgment of Madam Justice Neilson and find I take a different view.

[37] The College of Opticians of British Columbia seeks to have Coastal Contacts Inc. and Clearly Contacts Ltd. (the “suppliers”) precluded from marketing contact lenses under any circumstances on the Internet. The College applied for an injunction that, if granted in the terms sought, would have that effect. The College has argued its case broadly both before the judge who dismissed its application and in this Court, but the case is, in the final analysis, narrowed to the point my colleague addresses: whether, under the governing regulations, a prescription for contact lenses may be refilled by the suppliers without their seeing the prescription.

[38] The point turns on what is permitted under s. 5 of the *Opticians Regulation*, B.C. Reg. 487/94, promulgated by the Lieutenant Governor in Council under s. 12(2) of the *Health Professions Act*, R.S.B.C. 1996, c. 183. The *Act* provides for the designation of a “health profession”, here opticianry, and the establishment of the College. Section 12(2) provides for regulations for services that may be performed by members of the College (referred to as “registrants”), limits or conditions on such services, and services that may be performed under the supervision of a member of the College by a person who is not a member. The material sections of the *Regulation* provide:

5 (1) ...

(3) Subject to section 14 of the Act, no person other than a contact lens fitter may fill a prescription by fitting and dispensing contact lenses.

(4) Subsection (3) does not apply to a person

* * *

(c) refilling a prescription by dispensing contact lenses under the supervision of a contact lens fitter or a prescriber provided that person does not fit the contact lenses.

[en. B.C. Reg. 8/2002, s. 5]

“Prescription” is defined in s. 1:

“**prescription**” means the written record, prepared by a prescriber, of

- (a) the power of a lens to correct the refractive error of an eye, and
- (b) reading add, prisms, back vertex distance and contraindications;

“Prescriber” is defined as well:

“**prescriber**” means

- (a) an optometrist, or
 - (b) a qualified medical practitioner
- who prepares a prescription.

[39] The question then is whether, under the exception s. 5(4)(c) provides, the suppliers, who dispense contact lenses under supervision, must see a prescription (the written record) before refilling it. In my respectful view, it does not. In order to refill a prescription the suppliers must, of course, be given the contents of the prescription to be refilled, but unlike my colleague, I am unable to read into the wording employed any requirement that the suppliers see the record that constitutes the prescription.

[40] At least in this context, I have difficulty seeing why the fact that a prescription is a written record implies that it must be seen by a dispenser before it is refilled, as my colleague suggests (para. 21). On the wording of the *Regulation*, I see no reason why the contents of a prescription for contact lenses, which consist of a number, or several numbers, cannot be given to the suppliers when refills are purchased.

[41] I agree with the chambers judge (para. 49) there is no principle of statutory interpretation that permits reading into the *Regulation* a provision requiring the suppliers to verify the contents of a prescription. There is no basis on which I consider the wording can be said to impose on the suppliers a requirement to inspect a prescription to determine the contents are as represented, anymore than there is a requirement they confirm the accuracy of the contents of any prescription given to them.

[42] My colleague finds support for the meaning she ascribes to s. 5(1)(4)(c) of the *Regulation* in the wording of s. 4(2), which provides that opticians may “duplicate” eyeglass lenses without a prescription, and s. 5(1)(b), which prohibits any person other than an optician from doing so (para. 22). But no argument is addressed to those sections of the *Regulation* and no evidence is adduced about the mechanics of duplicating eyeglass lenses. I have no confidence in attributing any significance to s. 4(2) or 5(1)(b) for present purposes. It may be an optician, trained in the use of the proper equipment, can have a duplicate pair of eyeglasses made based on information that can be derived from the lenses of an existing pair of eyeglasses. No prescription for the duplicate lenses would then be required. Unless it were to be established the same could be said about contact lenses, i.e., they could be duplicated from an existing lens itself (rather than from the contents of a prescription), no support could be taken from a provision concerning the duplication of eyeglass lenses in giving a particular meaning to a provision about refilling contact lens prescriptions.

[43] The chambers judge found no ambiguity in the statutory provisions but considered that because they were penal in nature they would in any event have to be interpreted strictly. She said:

[53] Counsel for the respondents argued that the conclusions sought by the petitioner in this proceeding are penal in nature. Subsection 13(2) of the *Act* provides that if a regulation under the *Act* prescribes a service that may only be performed by a registrant of a particular college, other persons must not perform that service or recover any fee for that service. Section 51 of the *Act* provides that a person who contravenes s. 13(2) commits an offence. Thus, the petitioner is seeking a finding that amounts to a conclusion that the respondents are committing an offence.

[54] Counsel for the respondents also argued that the effect of the petitioner's position would be to extend the scope of their monopoly over the sale of contact lenses in B.C.

[55] If there was any ambiguity in the meaning of the statutory provisions at issue, the proper approach would be to read this section strictly rather than expansively, given that the provisions are penal in nature and seek to protect a professional monopoly: *Bell ExpressVu, supra* at para. 28; *Marcotte v. Deputy Attorney General (Canada)*, [1976] 1 S.C.R. 108; *George L. Brough Marine Consultants Ltd. v. Aqua Terra Flotations Ltd.* (1982), 18 B.L.R. 217 at para. 14 (B.C.S.C.).

[44] I share the chambers judge's view in this regard. A requirement that a prescription, i.e., the actual written record, be seen before it is refilled would appear to render anything less in dispensing contact lenses an offence under the *Health Professions Act*.

[45] The College maintains the provisions of the *Regulation* are to be interpreted in accordance with their object which is the protection of the public. Relying on evidence of the online purchasing process, the College contends the public is exposed to harm being suffered by the dispensing of contact lens refills which do not correspond to the prescription for any given consumer. There is said to be a great risk consumers will err when placing orders for contact lenses in providing the contents of their prescriptions. While the College has adduced no evidence of any actual harm that any consumers have suffered as a result of a purchasing error, and the judge refused to speculate as to whether such was probable, the College says the *Regulation* is to be interpreted in a way that will overcome or at least minimize any risk of this kind. But there is no principle that requires an interpretation that will minimize a risk of presumed harm simply because the object of a regulation is the protection of the public.

[46] The judge accepted the object of the *Regulation* was the protection of the public but took the view that was to be achieved in different ways:

[35] ... There is no question that the object of the *Regulation* is to protect the public. This is sought to be accomplished in more than one way. One way is to ensure that only qualified persons with special training undertake certain activities, thus protecting the health and safety of the public. Another way is to ensure that in providing for qualified persons to undertake certain activities, the scope of these activities is not extended too far. This protects the public from a monopoly that is too wide, driving up costs for the consumer for matters that do not require the same degree of intervention by trained specialists.

[36] The *Regulation* seeks to carve out and define the scope of activities that require the direct involvement of a licensed optician on the one hand, or the supervisory involvement of a licensed optician on the other hand. An example of this is s. 5(4) of the *Regulation*....

[47] The judge went on to explain the working of ss. 5(3) and 5(4)(c) of the *Regulation*:

[38] The respondents point out that the *Regulation* distinguishes between “filling a prescription by fitting and dispensing,” which must be done by a licensed optician who is a contact lens fitter, and “refilling a prescription by dispensing,” which can be done by a non-registered person under supervision of a contact lens fitter.

[39] The plain meaning of the *Regulation*, considered in the context of the object of the *Regulation*, is that when fitting of contact lenses is involved, which involves an eye examination and measurements of the eye, contact lenses cannot be dispensed except by a contact lens fitter pursuant to s. 5(3). This ensures that a qualified person is involved in the fitting of contact lenses. When fitting is not involved, a non-registered person may dispense contact lenses provided that the person is supervised by a contact lens fitter, pursuant to s. 5(4).

[48] Viewed in this light, on the plain meaning of the words, the *Regulation* can be seen to serve the protection of the public in both of the ways identified by the judge, thereby serving the regulatory objective. I consider that, as worded, s. 5(4)(c) leaves little room for the contention that the words “refilling a prescription” mean refilling a prescription only where the prescription (the written record) has been seen by the dispenser. Had the regulator intended it was necessary for the dispenser to see the actual record, or even a copy of it, for a prescription to be properly refilled, one would have expected some explicit provision to be made for such a significant requirement. That could certainly have been done and, for that matter, can, by amendment, still be done. I agree with the chambers judge:

[57] If the petitioner believes that a prescription verification requirement is necessary in the public interest, then it is free to work towards legislative change. Opponents might argue that such a change would create an unnecessary burden for consumers of contact lenses, drive up costs and assist members of the College in extending a monopoly over the sale of contact lenses. This debate would be up to the legislators to resolve.

[49] I conclude, however, there is now no such requirement.

[50] The suppliers’ internet site requires in no uncertain terms that a purchaser certify the existence of a prescription before any purchase can be made. My colleague has reproduced the suppliers’ requirements in this regard (para. 4). In simple terms, the onus to be accurate is on the purchaser, who has a particularly great interest in providing the correct information in order to ensure, in exchange for the money paid, the receipt of contact lenses that are entirely consistent with his or

her prescription. It appears to me to make no difference whether a purchaser chooses to take the information from the actual written record that is the prescription or from what is printed on a box of contact lenses acquired in filling the prescription. There may well be real benefits to consumers in terms of time, money, and convenience associated with refilling contact lens prescriptions online with the same manufactured products sold by opticians with whom the suppliers compete. On my reading of the *Regulation*, I see nothing in the suppliers' dispensing of contact lenses to refill prescriptions that warrants enjoining them from carrying on their business as they do. Nor do I see any justification for depriving the public of the advantages there may be of the established Internet service the suppliers provide.

[51] It follows that I would dismiss the appeal.

“The Honourable Mr. Justice Lowry”

CITATION: Gavin Downing v. Agri-Cultural Renewal Co-operative Inc. O/A Glencolton Farms (“ARC”) et al, 2018 ONSC 128
NEWMARKET COURT FILE NO.: CV-16-125371-00
DATE: 20180105

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:	)	
	)	
Gavin Downing, Director Appointed under	)	
the <i>Milk Act</i> , R.S.O. 1990, c. M.12	)	Nansy Ghobrial, Sunil Mathai and Ananthan
	)	Sinnadurai, for the Applicant
Applicant	)	
– and –	)	
	)	Elisa Vander Hout, self-represented and for
Agri-Cultural Renewal Co-operative Inc.	)	Glencolton Farms
o/a Glencolton Farms, Elisa Vander Hout,	)	
Markus Christian Schmidt, Johannes	)	Markus Christian Schmidt, self-represented
Osthaus Nikolaus Alexander, John Doe(s),	)	
Jane Doe(s) and Persons Unknown	)	Johannes Osthaus Nikolaus Alexander, self-
	)	represented
Respondents	)	
	)	
	)	Lewis Taylor and Jared Taylor, for the
Our Farm Our Food Cooperative Inc.	)	Intervener
	)	
Intervener	)	

– AND –

NEWMARKET COURT FILE NO.: CV-16-125250-00

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:	)	
	)	
The Regional Municipality of York, Simcoe	)	
Muskoka District Health Unit, and the	)	Doug Smith and Alannah Fotheringham, for
Regional Municipality of Peel	)	the Applicants
	)	

Page: 2

	Applicants	)	
		)	
– and –		)	
		)	
Michael Schmidt, Elisa Vander Hout,		)	Michael Schmidt, self-represented
Markus Christian Schmidt, Agri-Cultural		)	
renewal Co-Operative Inc., Nikolaus		)	Elisa Vander Hout, self-represented and for
Alexander Johannes Osthaus, John Doe,		)	Agri-Cultural Renewal Co-Operative Inc.
Jane Doe and Persons Unknown and The		)	
Church of the Christian Community in		)	Nikolaus Alexander Johannes Osthaus, self-
Canada		)	represented
		)	
	Respondents	)	Jonah Evans, for The Church of the
		)	Christian Community in Canada
		)	
		)	Heard: May 29, 30, 31, June 5, and
		)	December 21, 2017
		)	
		)	

2018 ONSC 128 (CanLI)

DECISION ON APPLICATIONS FOR A PERMANENT INJUNCTION

SUTHERLAND J.:

Overview

- [1] The applicants, in their respective applications, seek a permanent injunction against the respondents and all persons with knowledge of the injunctive order.
- [2] The applicant, Gavin Downing (“the Director”) seeks an order, pursuant to section 22 of the *Milk Act*¹ (“*Milk Act*”) restraining the operation of a plant located at 393887 and 393889 Lot 44 Concession 2 EGR, Glenelg Township, West Grey County, Ontario (“the Farm” and “Glencolton Farms”) without a licence and the respondent Agri-Cultural Renewal Co-Operative Inc. (“ARC”) and any related entity, and the individual respondents from operating a plant without a licence. The Director also seeks an order restraining the respondents and ARC’s employees and any other person involved in ARC’s operation from hindering or obstructing the inspection by a field person or officer appointed by the Director of ARC’s books, records and other documents as well as the Farm.
- [3] The applicants, The Regional Municipality of York (“York Region”), Simcoe Muskoka Health Unit (“SMHU”) and the Regional Municipality of Peel (“Peel Region”) (collectively, “the Municipalities”) seek, among other relief, a declaration that the

¹ R.S.O.1990, c.M.12.

respondents have contravened section 18 of the *Health Protection and Promotion Act*² (“HPPA”) by offering for sale, selling, delivering or distributing unpasteurized or unsterilized milk and unpasteurized or unsterilized milk products within the jurisdiction of The Regional Municipality of York and a permanent injunction restraining and enjoining the respondents and any and all persons having knowledge of the injunction from directly or indirectly, by any means whatsoever: offering for sale, selling or distributing, delivering or counselling others to offer for sale, sell, deliver or distribute unpasteurized or unsterilized or unpasteurized or unsterilized milk products with the jurisdiction of The Regional Municipality of York, permitting the use of their lands by others to offer for sale, sell or distribute, or deliver unpasteurized or unsterilized milk or unpasteurized or unsterilized milk products within the jurisdiction of The Regional Municipality of York. The Municipalities also request an order that the premises of the respondent The Church of the Christian Community in Canada (“the Church”), located at 901 Rutherford Road, Vaughan, Ontario, be closed to any use in anyway associated with or related to the offering for sale, selling, distribution or delivery of unpasteurized or unsterilized milk or milk products.

- [4] The respondents oppose the relief sought by the applicants. In support of their position the various respondents presented eighty-seven affidavits from various individuals in support of their opposition to the applications of the applicants. Since 1984, the respondent, Michael Schmidt has been involved with the issue of unpasteurized milk in the Province of Ontario. To fully appreciate the breadth of the issues in these applications and the position of the respondents, along with the numerous individuals in support of the respondents’, a history of the *Milk Act* and the *HPPA*, of the respondents and particularly, Michael Schmidt along with this proceeding is necessary.

Background

- [5] Michael Schmidt (“Michael”) is a dairy farmer who has a long history of advocating the legalization of the sale of raw milk, and was the originator of Glencolton Farms. The respondent Elisa Vander Hout (“Vander Hout”) is the spouse of Michael.
- [6] The operations of Glencolton Farms, included the selling, distributing, and delivering unpasteurized/unsterilized milk or raw milk and unpasteurized/unsterilized milk products or raw milk products. The operations of Glencolton Farms were transferred in or about 2009 to ARC, an Ontario corporation incorporated under the *Co-operative Corporations Act*³ (“CCA”).
- [7] The respondents Vander Hout, Markus Schmidt (“Markus”) and Nikolaus Alexander Johannes Osthaus (“Osthaus”) are Directors and Officers of ARC. Representations were made by the respondents that Osthaus has resigned his position as a director of ARC.
- [8] The respondents allege that while ARC owns the Farm, on which Glencolton Farm is situate, Our Farm Our Food Cooperative Inc. (“OFOF”) currently owns the cows and all

² R.S.O. 1990 c. H.7.

³ R.S.O. 1990, c. C.35.

the dairy and other equipment involved in the production of unpasteurized milk or raw milk.

- [9] The respondents are currently distributing and delivering unpasteurized/unsterilized or raw milk to members of OFOF in York Region every Tuesday from the parking lot of property owned and operated by the Church, at 901 Rutherford Road in Vaughan, Ontario.
- [10] The respondents are also distributing, and delivering unpasteurized/unsterilized or raw milk and unpasteurized/unsterilized products or raw milk products to members of OFOF at locations within Peel Region and within the jurisdiction of the SMHU.

Michael Schmidt and the Legal System

- [11] Michael originally operated a dairy farm within the milk quota system governing the distribution of milk within the Province of Ontario. In 1992, Michael cancelled his contract with the Milk Marketing Board and created a “lease-a-cow” system, whereby interested consumers of unpasteurized milk could ostensibly hold leasehold interests in the cows in an effort to comply with legislation prohibiting the production, sale and distribution of unpasteurized milk and milk products.
- [12] On February 17, 1994, an order was issued by the Grey Bruce Health Unit under section 13 of the *HPPA* directing Michael to cease the manufacturing, processing, and preparation etc. of raw milk and raw milk products on the grounds that such constituted a health hazard (the “Grey Bruce Order”).
- [13] An appeal of the Grey Bruce Order was taken by Michael to the Health Protection Appeal Board (“HPAB”). For reasons given on September 1, 1994, the HPAB dismissed the appeal.
- [14] Michael was also charged by the Grey Bruce Health Unit with contravening section 18 of the *HPPA*, which prohibits the sale or distribution of milk or milk products that have not been pasteurized or sterilized in a plant that is licensed under the *Milk Act*. Michael was subsequently convicted of that offence and an offence under the *Milk Act*, fined \$3,500 and placed on probation for a period of two years.
- [15] In 1994, York Region Public Health issued an order under section 13 of the *HPPA* to Michael requiring him to cease selling and distributing raw milk in York Region (the “York Region Order”).
- [16] After the lease-a-cow scheme proved ineffective, a “cow-share” scheme was developed whereby an interested consumer of raw milk could enter into a contractual agreement which created a fractional ownership interest in one of his cows.
- [17] Under the cow-share scheme, individual cow-share members paid \$300 in exchange for a one-quarter interest in one of the cows on the Farm. The raw milk was transported first to the parking lot of the Waldorf School and then, later on, to the Church where the milk

was collected by the cow-share members upon payment. By the end of the cow-share programme, there were approximately 150 members.

- [18] Every member was fully aware that he or she was receiving raw milk and no one could receive milk from Glencolton Farms unless he or she was a cow-share member. In return for the cow-share fee and the payment by members for raw milk upon delivery, the service provided to the members included feeding, cleaning, housing the cows, and bottling, cooling and transporting the milk. The members had access to the cows' health records and milk test results. An independent dairy inspector inspected the operation annually.
- [19] In 2006, nineteen charges (the "2006 Provincial Charges") were instituted by the Province of Ontario for contraventions of section 18 of the *HPPA* and section 15 of the *Milk Act*.
- [20] In 2006, York Region discovered that Michael and others were still delivering and distributing raw milk and other products from the Farm to its cow-share members in Thornhill in a recognizable blue bus (the "Blue Bus").
- [21] On December 5, 2006, the second order issued by York Region's Public Health Services Branch pursuant to section 13 of the *HPPA* (the "Second York Region Order") was served whereby it was ordered to cease the offering for sale, sale, or distribution of unpasteurized milk and its products within the jurisdiction of York Region.
- [22] The terms of the Second York Region Order were not complied with and the distribution of unpasteurized milk within the jurisdiction of York Region continued. York Region applied to the Superior Court of Justice for an order pursuant to section 102 of the *HPPA*.
- [23] On May 17, 2007 Ferguson J. issued an order (the "2007 Court Order") restraining from contravening the Second York Region Order and from offering for sale or distributing raw milk and raw milk products within the jurisdiction of York Region.
- [24] The 2007 Court Order was not complied with and York Region brought a motion in the Superior Court of Justice for contempt. The motion was heard by way of a trial of an issue by Boswell J. on September 10 to 12, 2008. On October 20, 2008, Boswell J. released Reasons for Decision in which he found Michael in contempt of the 2007 Court Order in that he continued to distribute unpasteurized milk in York Region ("the Ontario Contempt Order").
- [25] By way of Reasons for Decision dated December 2, 2008, Boswell J. sentenced Michael to a fine of \$5,000 and awarded costs to York Region in the amount of \$50,000. The requisite Judgment was issued.
- [26] The 2006 Provincial Charges went to trial before Justice of the Peace Kowarsky in 2010. Michael argued that he did not violate the *HPPA* or the *Milk Act* as he had only supplied unpasteurized milk to individuals who had entered into the cow-share agreements. He

also argued that the statutory provisions prohibiting the sale of unpasteurized milk were contrary to section 7 of the *Canadian Charter of Rights and Freedoms* (“the *Charter*”).

- [27] At trial, the Justice of the Peace accepted Michael’s argument that providing unpasteurized milk to individuals who had entered into cow-share agreements was not caught by the legislation and dismissed all the charges.
- [28] The Crown appealed the acquittals to the Ontario Court of Justice and the appeal was heard by Tetley J. on April 13, 2011. For Reasons released on September 28, 2011⁴, Tetley J. found that the Justice of the Peace had erred in his approach to statutory interpretation and found that by operating the Farm and selling and distributing unpasteurized or unsterilized milk to cow-share members violated both statutes. Tetley J. further concluded that there was no violation of the *Charter* by the statutory provisions in issue. Tetley J. entered convictions on 13 of the 2006 Provincial Charges and imposed fines totaling \$9,150, and one year of probation.
- [29] Michael appealed the convictions entered by Tetley J. in respect of the 2006 Provincial Charges to the Ontario Court of Appeal. The Ontario Court of Appeal dismissed the appeal with Reasons released on March 11, 2014. The Court of Appeal rejected the argument that the cow-share agreements amounted to an arrangement that took the activities outside the reach of the *HPPA* and the *Milk Act*. The Court of Appeal found that the cow-share agreement did not transfer an ownership interest in a particular cow and that the member did not acquire the rights that ordinarily attach to ownership. The Court of Appeal further found that the cow-share programme was nothing more than a marketing and distribution scheme.
- [30] Leave to appeal the decision of the Ontario Court of Appeal in respect of the 2006 Provincial Charges to the Supreme Court of Canada was sought and leave was denied on August 14, 2014.
- [31] On October 2, 2013, Michael was found guilty of civil contempt in British Columbia for packaging and distributing raw milk for human consumption contrary to the terms of a permanent injunction order granted in 2010 (the “BC Injunction Order”).
- [32] The BC Injunction Order was obtained on application by the Fraser Health Authority originally against Alice Jongerden (“Jongerden”), who was found to have sold and distributed raw milk for distribution for human consumption contrary to British Columbia’s *Public Health Act*, through an operation known as “Home on the Range” or “Our Cows”. The BC Injunction Order prohibited Jongerden and anyone having notice of the Order from packaging and/or distributing raw milk and/or raw milk products for human consumption.
- [33] Michael took over operation of the Home on the Range farm in 2010 and purported to sell raw milk as a “cosmetic”. He was served with a copy of the BC Injunction Order and was ordered by the Fraser Health Authority to cease and desist from the production and

⁴ *R. v. Schmidt*, 2011 ONCJ 482 (CanLII).

distribution of raw milk. When he refused to do so, the Fraser Health Authority sought an order finding Michael in contempt of the BC Injunction Order.

- [34] On October 2, 2013 Wong J. of the Supreme Court of British Columbia found Michael in contempt of the BC Injunction Order (the “BC Contempt Order”). Wong J. found that Michael had a central role in taking over the operations of Our Cows and that the description of the raw milk being sold as a “cosmetic” was a ruse. Michael was sentenced to a term of imprisonment of 3 months, suspended with a probationary period of one year.
- [35] Michael appealed the BC Contempt Order and the appeal was dismissed with costs by the BC Court of Appeal on February 12, 2015.

Farm Co-operative

- [36] In 2007, Vander Hout changed the name of a co-op that she controlled from “Circle Sun Farm Workers Co-op” to “ARC”, a worker-owned co-op. In 2010, title in the Farm property was transferred from Michael to his previous wife, Dorothea Schmidt and then from her to ARC.
- [37] Many of the cow-share members were offered an opportunity to purchase shares in ARC in order to become shareholders. Approximately 150 people purchased shares in ARC and generally, most of the shareholders were former cow-share members.
- [38] Generally, members paid \$2,000 for 20 Preference A (non-voting) shares in ARC. On top of that, members paid for any milk that they consumed at a price of \$3.00 to \$5.50 per litre.
- [39] People purchased shares in ARC in order to gain access to raw milk. ARC only allowed its shareholders to purchase the raw milk produced at Glencolton Farms.
- [40] ARC shareholders ordered raw milk and other products from Glencolton Farms by way of a website known as FarmMatch. Once the orders were placed, FarmMatch would calculate the cost of the order.
- [41] The raw milk produced at Glencolton Farms was distributed by a few different methods: some of the ARC shareholders picked up their milk directly from the Farm; Vander Hout delivered milk directly to an address in Brampton, an address in Cookstown and at times an address in Barrie. Deliveries were every Tuesday. Raw Milk and raw milk products were transported from the Farm to the Church in a Mercedes van leased by ARC, where it would be collected by ARC shareholders.

OFOF

- [42] OFOF was incorporated in January 2016. People who wanted to become members in OFOF were required to invest \$2,000 consisting of: the purchase of one membership share at a cost of \$100; the purchase of nine Class A Preference Shares at a cost of \$100

for a total of \$900; and, the provision to OFOF of a non-interest-bearing loan in the amount of \$1,000.

- [43] There are currently about 150 members of OFOF. Most of the current OFOF members were former ARC shareholders. A number of the ARC shareholders sold back their ARC shares in order to make the \$2,000 investment in OFOF.
- [44] Individuals purchased shares in OFOF in order to gain access to raw milk and raw milk products.
- [45] By way of a purchase and sale agreement dated March 1, 2016 (the “Purchase Agreement”) ARC sold to OFOF all of the cows and dairy equipment on the Farm. By way of a lease agreement dated March 1, 2016 (the “Lease Agreement”), OFOF leased from ARC certain areas of the Farm involved in the production of milk and milk products. By way of a Management Agreement dated March 1, 2016 (the “Management Agreement”), OFOF purported to retain ARC to care for the cows and manage the dairy operations.

Search Warrant

- [46] The Director obtained a search warrant and on October 2, 2015 attended at Glencolton Farms to execute on said search warrant. Member(s) of the Agricultural Investigators Unit (AIU) attempted to execute the search and were unable to do so. Obstruction of a peace officer, namely investigator Glenn Jarvie, charges were laid against Michael and other individuals who were present at the Glencolton Farms. These charges against Michael went to trial. On October 19, 2017, R.A. Minard J. convicted Michael of the obstruction of a peace officer charge. Michael has appealed his conviction and sentence to the Ontario Court of Appeal.

Issues

- [47] The questions for this court to answer are:
 - (a) Are the actions of the respondents, or anyone of them, in violation of the *Milk Act*?
 - (b) Are the actions of the respondents, or anyone of them, in violation of the *HPPA*?
 - (c) Does the “family farm” exemption” apply?
 - (d) If the actions of the respondents, or anyone of them, are in violation of the *Milk Act* and/or *HPPA* and the “family farm” exemption does not apply, should a permanent injunction be granted?
- [48] For the reasons below, this court answers the four questions as follows:
 - (a) In the affirmative that the respondents are in violation of the *Milk Act*.

- (b) In the affirmative that the respondents are in violation of the *HPPA*.
- (c) In the negative that the “family farm exemption” applies.
- (d) In the affirmative that an injunction should be granted.

A. Are The Actions Of The Respondents, Or Anyone Of Them, In Violation Of The Milk Act?

i. The Milk Act

[49] The *Milk Act* is remedial and regulatory legislation.⁵

[50] The *Milk Act* was originally introduced in 1965. It flowed from “the Royal Commission Inquiry into the Milk Industry” (known as the Hennessey Commission). In the 1960’s the marketing system for milk operated under the *Milk Industry Act* was in disarray. There was dissatisfaction among producers due to disparities of returns. The Ontario government appointed the Royal Commission. Based on the findings from the Hennessey Commission, the *Milk Act* was introduced in 1965. The primary purpose of the *Milk Act*, at the time, was to develop the Milk Commission of Ontario and the Ontario Milk Marketing Board which established a comprehensive marketing plan in Ontario with the power to set prices, establish quota, establish pools and buy and sell raw milk.⁶ In developing this comprehensive marketing plan, the regulation of the quality of raw milk produced and its viability for human consumption formed part of the regulatory plan but did not seem to be the impetus for the need of the comprehensive plan.

[51] The present day *Milk Act* sets out its purposes in section 2. Section 2 reads:

2. The purpose and intent of this Act is,

- (a) to stimulate, increase and improve the producing of milk within Ontario;
- (b) to provide for the control and regulation in any or all respects of the producing or marketing within Ontario of milk, cream or cheese, or any combination thereof, including the prohibition of such producing or marketing in whole or in part; and
- (c) to provide for the control and regulation in any or all respects of the quality of milk, milk products and fluid milk products within Ontario.

⁵ *R. v. Schmidt*, 2014 ONCA 188 (CA) (CanLII).

⁶ Ontario Ministry of Agriculture, Food and Rural Affairs, OFOF’s Responding Book Vol 3.

[52] Sections 2.1 to 2.11 set out the Minister of Agriculture, Food and Rural Affairs (the “Minister”) authority to administer and enforce the provisions of the *Milk Act* as well as the Minister’s authority to enact regulations concerning the quality of the milk, and the administration and enforcement of the Act.

[53] Section 22 of the *Milk Act* states:

22. Where it is made to appear from the material filed or evidence adduced that any offence against this Act or the regulations or any plan, order, direction, agreement, award or renegotiated agreement or award made under this Act has been or is being committed, the Superior Court of Justice may, upon the application of the Commission, the Director or a marketing board, enjoin any transporter, processor, operator of a plant, absolutely or for such period as seems just, and any injunction cancels the licence of the transporter, processor, distributor or operator of a plant named in the order for the same period.

[54] From the evidence filed on this motion, does it appear that any offence against the *Milk Act* or its regulations has been or is being committed by the actions of the respondents, or anyone of them?

ii. Positions of the Parties

The Director

[55] The Director submits that the respondents have committed and continue to commit offences against the *Milk Act* and its regulations. The Director argues that the respondents are transporters, processors, distributors and operators of a plant as defined in section 1 of the *Milk Act*. The evidence clearly shows, the Director argues, that the respondents and the intervener, OFOF, are operating a plant which milk and milk products are processed. The respondents and OFOF are processing and manufacturing raw milk and raw milk products at Glencolton Farms. The evidence on this motion supports this assertion, the Director contends, by indicating that on the Farm there is various equipment used in the “processing” of milk and milk products, which include:

- (a) A kettle/vat to heat the milk in order to manufacture raw milk products, such as cheese.
- (b) A bulk tank to store milk and empty bottles lined up adjacent to the bulk tank, in the processing area, to bottle the milk.
- (c) A butter churn in the processing area used to make butter.
- (d) A cream separator in the processing area used to separate cream from milk, a step in both the butter and cream-making process.

- (e) The presence of starter cultures, a kettle for heating and cooling, cheese forms actively draining whey and wheels of cheese ageing within heated incubators which all indicate the making of cheese from the raw milk.
- [56] Further, the evidence also shows that the respondents are transporting and delivering raw milk and raw milk products to individuals off the Farm by driving a Mercedes van to designated areas in York Region, Peel Region and Simcoe County. The raw milk and raw milk products are delivered to individuals, who seem to be shareholders of ARC or their family members in ARC, and money passes hands from these people to the respondents to receive raw milk and raw milk products processed on Glencolton Farms by the respondents and OFOF.
- [57] The respondents and OFOF do not have a licence issued by the Director to operate a plant to process, milk and milk products in Ontario. Thus, the Director argues the respondents and OFOF have committed and are committing an offence contrary to the *Milk Act*, namely section 15(1) which prohibits the operation of a plant without a licence.

The Respondents and OFOF

- [58] The respondents and OFOF do not deny that there is processing of raw milk on Glencolton Farms. The respondents and OFOF do not deny that there are raw milk products being manufactured on Glencolton Farms. The respondents and OFOF do not deny that raw milk and raw milk products are being delivered to shareholders of OFOF and their respective family members. The respondents and OFOF contend that the operation on Glencolton Farms is not an activity that is subject to the provisions and regulations of the *Milk Act*.
- [59] The respondents and OFOF point out that Glencolton Farms is owned and operated by ARC since 2008. ARC in March 2016 sold all of its dairy cattle, and milk-related equipment to OFOF. Through a management contract between OFOF and ARC, ARC manages the property of OFOF, namely the cattle, the milk produced and milk-related equipment. ARC still is the registered owner of Glencolton Farms but leases space at the Farm to OFOF to have the cattle and milk-related equipment reside on the farm.
- [60] The shareholders of ARC were invited to become shareholders of OFOF. By being shareholders in OFOF, the shareholders were the owners of the cows, the milk produced and the milk-related equipment. The milk and milk products were then managed and processed on behalf of the OFOF shareholders through the Management Agreement between OFOF and ARC. Thus, the ownership and equity interest is that of the shareholders of OFOF. It is the shareholders' of OFOF cows and milk produced. It is the same shareholders' milk products. The shareholders are the only ones who receive the milk and milk products. The milk and milk products are transported to them by the company they own, OFOF. Accordingly, given that the shareholders of OFOF are the recipients of the raw milk and raw milk products, there is no sale of the raw milk or raw milk products to third parties and there is no processing to anyone but the owners/shareholders. There is no plant on Glencolton Farms as defined in the *Milk Act*.

There is no offence committed. This is akin to the “family farm exemption”, which I will discuss later.

- [61] OFOF argues, similar to the respondents, that there is no provision in the *Milk Act* that prevents private owners of dairy milk to collect that milk for their own purposes to consume. The shareholders of OFOF paid money to become shareholders. OFOF pays ARC to manage the cows, obtain the raw milk and provide it to the shareholders of OFOF. OFOF has paid ARC in excess of \$283,000. The process of becoming a shareholder in OFOF is restricted. One must apply and be accepted by the OFOF Board of Directors (“the Board”) after the Board vets the application. One cannot obtain raw milk or raw milk products from OFOF unless one is a shareholder or family member of the shareholder.
- [62] ARC and OFOF conducted the sales transaction of the cattle and milk-related equipment after and in response to the decision of Tetley J.⁷ and the Ontario Court of Appeal⁸ in *R. v. Schmidt*.
- [63] To understand the sales transactions, Management Agreement and Lease Agreement between the ARC and OFOF, a discussion of the two decisions is necessary.

iii. *R. v. Schmidt*

The Decision of Tetley J.

- [64] Tetley J. heard an appeal from the decision of Justice of the Peace P. Kowarsky dated January 21, 2010.⁹ Justice of the Peace Kowalski acquitted Michael of the charges under the *HPPA* and *Milk Act*. Tetley J. allowed the appeal and entered a conviction and sentence.
- [65] In a well-reasoned and written decision, Tetley J. described the “farm family exemption” as follows:

[2] Surprisingly, given the Appellant’s position as to the pervasive risks to public health arising from human consumption of raw milk, it is not against the law to consume unpasteurized milk in Ontario. That lawful entitlement is subject, however, to significant legal restriction that appears to be designed to control or restrict consumption of raw milk to those who actually produce the milk. Although personal consumption has effectively been legislatively limited to the dairy farmer and members of his or her immediate family. Those individuals comprise the so called “farm family exemption”.

⁷ [2001] O.J. No. 4272.

⁸ *Supra*, footnote 5.

⁹ 2010 ONCJ 9 (CanLII).

[66] Tetley J. continues and states:

[5] Presumably, if a resident enjoys ownership of the means of production, a cow, that individual, together with members of their family, can consume raw milk with impunity. This issue was considered in an earlier proceeding involving a 1994 regulatory review of a Public Inspector's Order directing that the Respondent cease and desist from selling unpasteurized milk and milk products. In that review, the Health Protection Appeal Board, a specialized tribunal with jurisdiction to review the decisions of *H.P.P.A.* inspectors, defined the parameters of the legal entitlement to consume unpasteurized milk as follows:

The *H.P.P.A.* does not state clearly that members of "farm families" may consume unpasteurized milk and milk products; rather the exception which allows them to do so is implicit. Section 18 of the *Act* does not prohibit the consumption of unpasteurized milk or milk products in a private residence. Similarly, the definition of "food premise" contained in section (1) (1) of the *Act*, and further refined in section 2(1) of Regulation 562, R.R.O. 1990, excludes a private residence. The effect of the definition is to preclude the application of section 42.52 of Regulation 562, which sets out private residence of a "family farm" differs from a private residence of anyone else *vis-à-vis* consumption of unpasteurized milk and milk products, is that the members of "farm families" have access through a means not prohibited by section 18 of the *Act*. (Health Services Appeal and Review Board-Reasons for Decision- September 1, 1994 p.11)

[67] Tetley J. described the "cow-share" programme where private individuals contractually own fractions of cows and the milk produced by that cow for consumption as Michael is paid a capital cost as the herdsman and receives additional compensation for the costs of production and labour. Tetley J. concluded that the "cow-share" programme does violate the *Milk Act* and *HPPA*, allowed the appeal and sentenced Michael.

[68] Michael appealed to the Ontario Court of Appeal. The Appeal Court dismissed the appeal and found that the cow-share programme does not take the activities outside "the reach of the *HPPA* and the *Milk Act*."¹⁰ The Court went on and stated:

¹⁰ Supra, footnote 5, para. 25.

[25] ...The oral cow-share agreement does not transfer an ownership interest in a particular cow or in the herd as a whole. The member does not acquire or exercise the rights that ordinarily attach ownership. The member is not involved in the acquisition, disposition or care of any cow or of the herd. The cow-share member acquires a right of access to the milk produced by the appellant's dairy farm, a right that is not derived from an ownership interest in any cow or cows....This court has resisted schemes that purport to create "private" enclaves immune to the reach of public health legislation and has insisted that public health legislation not be crippled by a narrow interpretation that would defeat its objective of protecting from risks to health: (citation omitted)¹¹

[69] At paragraph 27, the Court of Appeal further states:

[27] For similar reasons, I cannot accept the appellant's submission that the *Milk Act* licence requirement does not apply to the appellant's operation. The *Milk Act* makes no exception for "private" operations. Even if it did, the appellant operates a plant from which any members of the public can procure unpasteurized milk.

[70] The question then is whether the present shareholdings in *OFOF* fall outside the gambit of the *Milk Act*.

iv. Analysis

[71] Section 1 of the *Milk Act* defines the following:

"milk" means milk from cows or goats.

"plant" means a cream transfer station, a milk transfer station or premises in which milk or cream or milk products are processed.

"processing" means heating, pasteurizing, evaporating, drying, churning, freezing, packaging, separating into component parts, combining with other substances by any process or otherwise treating milk or cream or milk products in the manufacture or preparation of milk products or fluid milk products.

[72] From the evidence filed on this application, it does appear to this court that the actions of the respondents and *OFOF* contravene sections 14(1) and 15(1) of the *Milk Act*. The respondents and *OFOF* have constructed a building intended for use as a plant without a permit and are operating that plant without a licence from the Director.

¹¹ Ibid, para 25.

- [73] The evidence, which is not contradicted by the respondents or OFOF, is that there is equipment in a building on Glencolton Farms used for the heating, churning, packing and separating into component parts cow's milk and products of cow's milk. There is also no dispute that raw milk products, cheese and other similar products, are manufactured at Glencolton Farms.
- [74] The respondents and OFOF contend that the operation is not a commercial operation and thus, does not contravene the *Milk Act*. I do not accept this submission. Whether the operation is for commercial purposes that is the making of a profit, is not material. It is the processing of cows' or goats' milk where milk or milk products are manufactured that is material. The evidence provided does clearly show that milk and milk products are being processed to be delivered to the shareholders of OFOF and their respective families.
- [75] It therefore seems apparent to this court that the respondents and OFOF are processing milk and milk products in a building without the necessary approvals and licence from the Director to do so. This, *prima facie*, are actions that are offences that are committed against the *Milk Act*.
- [76] Accordingly, I find that the actions of the respondents and OFOF are in contravention of the *Milk Act*, namely sections 14(1) and 15 (1), subject to the "family farm exemption" applying.

B. Are The Actions Of The Respondents, Or Anyone Of Them, In Violation Of The HPPA?

- [77] The *HPPA* is remedial legislation that mandates that milk and milk products sold or distributed must be pasteurized or sterilized.
- [78] The purpose of the *HPPA* is described in section 2 as:

Purpose

2 The purpose of this Act is to provide for the organization and delivery of public health programs and services, the prevention of the spread of disease and the promotion and protection of the health of the people of Ontario

- [79] Section 18 of the *HPPA* states:

Unpasteurized or unsterilized milk

18. (1) No person shall sell, offer for sale, deliver or distribute milk or cream that has not been pasteurized or sterilized in a plant

that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards licensed under the *Milk Act*.

Milk products

(2) No person shall sell, offer for sale, deliver or distribute a milk produce processed or derived from milk that has not been pasteurized or sterilized in a plant that is licensed under the *Milk Act* or in a plant outside Ontario that meets the standards for plants licensed under the *Milk Act*.

- [80] Under the *HPPA* milk is defined in section 1(1) as “milk from cows, goats or sheep”.
- [81] The *HPPA* clearly prevents the selling, offer for sale, delivery or distribution of raw or unpasteurized milk or their products.
- [82] The respondents do not dispute that the evidence on this application shows that they were and are delivering or distributing unpasteurized milk and their products to the shareholders of OFOF. The respondents dispute that they are selling raw milk and their products. The Ontario Court of Appeal in *R. v. Schmidt*¹², at paras. 22, 23 and 24, found that the operation of the cow-share programme clearly falls within the ordinary meaning of “distribute” and “sale”, even though “distribute” and “sale” are not defined in the *HPPA*. On the evidence provided, it seems abundantly evident that the respondents and OFOF are, at a minimum, distributing raw milk and their products to shareholders of OFOF, within the ordinary meaning of “distribute”.
- [83] The respondents contend that the shareholders have the right to consume raw milk if they wish for their health benefits and/or based on their cultural or religious beliefs and that the shareholders of OFOF fall within the “family farm exemption”.

i. Health Benefits and Religious Beliefs

- [84] The respondents have provided this court with much evidence on the health benefits of raw milk, how other jurisdictions deal with the distribution and sale of raw milk, and eighty-seven affidavits from various shareholders of OFOF. Seventy-five affiants state that they need to consume raw milk for health reasons. Twelve affiants state that they consume raw milk for cultural reasons and one affiant deposes that he consumes raw milk for religious reasons.¹³
- [85] The evidence provided by the respondents indicate:

¹² Supra, footnote 5.

¹³ The affidavits illustrate the demand by various people from various backgrounds to consume raw milk and their products. Seventy-five affidavits are found in the Responding Application of the Intervenor, OFOF, volumes I, II and III, and eighty-six affidavits in the Responding Application Record of Michael Schmidt, volumes I and III.

- (a) 1.84% of the Ontario population, nearly 258,000 people, access raw milk. The vast majority obtain their raw milk from alternate sources.
- (b) 88.9% of approximately 4,000 dairy farmers in Ontario consume raw milk.
- (c) OFOF membership is 143 people plus their families.
- (d) Canada is the only G8 country which prohibits the distribution and sale of raw milk.
- (e) 42 States in the United States of America have legalized the sale and/or distribution through legislation. Since 1994, the year prosecution actions against Michael began, sixteen States in the United State of America have legalized the sale and/or distribution of raw milk or increased access to raw milk to the general public.
- (f) The affiants that choose to consume raw milk are aware of the health issues arising from the consumption of unpasteurized milk and choose to do so on their own accord. If this court grants the injunction requested by the Director and the Municipalities, the affiants will still obtain raw milk for consumption by other means.
- (g) Affiants have deposed that the drinking of raw milk is done for health reasons, including arthritis¹⁴ and inflammation, gastrointestinal issues¹⁵, children's health issues,¹⁶ calcium and bone issues,¹⁷ and Lupus.¹⁸
- (h) Affiants have deposed that the drinking of raw milk is required for religious and cultural reasons.¹⁹
- (i) There is various scientific research on the health risks and benefits on the consumption of raw milk.²⁰ In paragraphs 89, 90 and 91 of the Affidavit of Nadine Ijaz, Ms. Ijaz concludes that with regulatory control on the sale and distribution of raw milk, the risk of disease from "key foodborne hazards" can be reduced to "low" or "negligible". Complete prohibition of the sale and distribution of raw milk does not minimize the potential risk to those who seek out raw milk and its products for consumption.

¹⁴ OFOF Responding Application: Affidavit of Judy Corras (Tab 14).

¹⁵ OFOF Responding Application: Affidavits of Stephen Corras (Tab 8), Richard Chomko (Tab 17), Edward Tait (Tab 19), Rasha Coleman (Tab 52), James L. Affleck (Tab 69).

¹⁶ OFOF Responding Application: Alireza Khani (Tab 25).

¹⁷ OFOF Responding Application: Anna Dekleva (Tab 12) and Andrea Lemieux (Tab 18).

¹⁸ OFOF Responding Application: Latoya Nongauza (Tab 67).

¹⁹ OFOF Responding Application: Eric Bryant (Tab 22), Zaguir Hassen (Tab 55).

²⁰ The Affidavit of Nadine Ijaz (OFOF Responding Application Tab 75) and Volumes I and II of the Book of Health Authorities from the Affidavit of Nadine Ijaz.

- [86] There is no question that there is a demand in the Province of Ontario to consume unpasteurized/raw milk and their products. Consumers have a varied set of reasons to consume raw milk and their products, as illustrated by the eight-one affidavits. The choice to do so seems to this court to be for their own personal reasons: cultural, health or religious.
- [87] The respondents and OFOF have submitted to this court that the ability of Ontarians to purchase and consume raw milk and their products can and should be regulated similar to the sale and regulation of cigarettes, alcohol and soon marihuana. There is a demand for the product. Ontarians want to have the product for their own choice and reasons. Other countries have regulated the sale and distribution of raw milk and their products, why cannot Ontario?
- [88] There is a logical and common sense appeal to the submissions of the respondents and OFOF. I agree with Tetley J. that there is an inherent illogical reasoning on part of the Attorney General of Ontario that the prohibition of the sale and distribution of raw milk and their products are for health reasons but the consumption of raw milk per se is not illegal. In addition, the respondents contend that the sale of cigarettes and alcohol are legal and permitted and each of these products can have potential negative health consequences.
- [89] Though this court has sympathy with the position of the respondents and OFOF, the authority of this court is limited. As the Ontario Court of Appeal stated in *R. v. Schmidt*²¹:
- ... However, provided that the legislature has acted within the limits imposed by the constitution, the legislature's decision to ban the sale and distribution of unpasteurized milk to protect and promote the public health in Ontario is one that must be respected by this court.
- [90] The question of whether either or both statutes violate one or more Ontarians of a constitutionally protected right or freedom is not before this court.
- [91] Accordingly, I am satisfied that the preponderance of evidence provided on this application shows that the respondents and OFOF are delivering and distributing unpasteurized/unsterilized or raw milk and their products in the Province of Ontario.
- [92] I therefore come to the conclusion that the respondents are in breach of sections 18(1) and 18(2) of the *HPPA*, subject to qualifying under the "family farm exemption".

C. Does The "Family Farm Exemption" Apply?

- [93] The respondents and OFOF eloquently argue that notwithstanding the processing of milk and milk products on Glencolton Farms, the owning of shares, the transfer of ownership of the cows and equipment to OFOF, the consideration paid and selective process of

²¹ Supra, footnote 4, para 21.

becoming a shareholder takes the actions on Glencolton Farms outside of the *Milk Act* and the *HPPA*. In effect, the close knit organization of ownership of the cows and related equipment is akin to a family farm and thus, the “family farm exemption” applies.

- [94] At first blush, this argument seems reasonable and seems to adhere to the statements of Tetley J. and the Ontario Court of Appeal. There is a transfer of ownership. The shareholders through the Board and shareholders meetings have an element of control over the cows and process. There is a Management Agreement between OFOF and ARC on the caring and maintenance of the herd. One has to apply to be a shareholder in OFOF. The applications are screened and approval is required by the Board. Membership is restricted and thus, is not open to the public as a whole, as with a membership in a “big-box” store. Membership entitles one to shares which translates into ownership of the assets of the company, OFOF. Actual money exchanged hands for the purchase of the cows and milk-related equipment from OFOF to ARC. One of the shareholders, Van Holt does reside on Glencolton Farms.
- [95] The “family farm exemption” is not defined by legislation. As Tetley J. quoted in his Reasons, there does seem to be a difference between “farm families” and private residences in that “farm families” have an “access through a means not prohibited.”²²
- [96] In taking a common sense approach to the meaning of “family farm”, I do not accept the submission of the respondents and OFOF that the shareholders in this case fall within the “family farm exemption”. Family is defined in the Oxford dictionary as: “a group of people related by blood, marriage or adoption”²³. There is no application process to be a family member. One does not complete a form which is then approved by others. A family is a group of people related by blood, adoption or by marriage to someone who is related by blood or adoption. The owning of shareholdings in a company is not in itself a family.
- [97] Having said this, I can envisage a family owned company, where family are the sole shareholders that own the farm operation, and family member(s) reside on the farm may fall within the “family farm exemption”. But that is not the facts in this case. The shareholders of OFOF are not related by blood, marriage or adoption. The shareholders are strangers that have a common interest, being the consumption of raw milk and its products. That interest does not, on its own, I find, qualify as a family to fall within the gambit of the “family farm exemption”.
- [98] Historically, the family farm was that, a farm inhabited and operated, sometimes over generations, by famers related to each other by either blood, marriage or adoption. The product and operation of the farm may have changed over the years but the farm stayed inhabited and operated by family members, either by blood, marriage or adoption. To me, the meaning and intention of the “family farm exemption” is that of farmers and their family members who consume unpasteurized or unsterilized milk, among themselves,

²² Supra, footnote 4, para. 5.

²³ Oxford Canadian Dictionary of Current English, Oxford University Press, 2005 first published.

which is produced from cows residing on the farm property that are owned or leased by the family farm, be it an incorporated entity or not.²⁴

- [99] In addition, this court must be cognizant of the instructions from the Ontario Court of Appeal to not permit “schemes that purport to create “private” enclaves immune to the reach of public health legislation.”²⁵
- [100] The *Milk Act* and the *HPPA* both have components of public health. The control and regulation of milk, pasteurized milk, and their products within Ontario for the public health. As a public welfare legislation, a broad and purposeful statutory interpretation is mandated that facilitates the intention and purpose of the legislation.²⁶
- [101] Given this public health concern, to broaden that definition of “family farm” as suggested by the respondents and OFOF to include a corporation, as discussed above, would eviscerate the public health aspect of both the *Milk Act* and *HPPA*. Such a broadening would permit people to incorporate a company, transfer cows and equipment, open up shareholdings that would permit people to consume milk, without being subject to the provisions of the *Milk Act* or the *HPPA*. Such a situation does not adhere to the purpose and intention of either statutes.
- [102] As already stated, the right of individuals to produce and consume milk and milk products outside of the regime outlined in the *Milk Act* and the *HPPA* is not for this court to determine. This is an issue for the policy decision makers, the Ontario legislature, to determine, weighing the benefits to the public good, which includes those who wish to consume raw milk and raw milk products distributed by likeminded individuals such as the respondents.
- [103] Therefore, I do not find that OFOF, the shareholders of OFOF, or the actions of the respondents fall within the “family farm exemption”.

D. Should A Permanent Injunction Be Granted?

- [104] Section 22 of the *Milk Act* provides this court with the authority to grant an injunction if the court is satisfied “from the material filed or evidenced adduced” that an offence against the Act has been or is being committed.
- [105] Section 102(2) of the *HPPA* reads:

(2) Where any provision of this Act or the regulations is contravened, despite any other remedy or any penalty imposed, the

²⁴ Ontario *Land Transfer Act*, RSO 1990 c. L.6 and Regulation 697, RRO 1990 contains an extensive definition of family that defines the membership of a family with a list of blood relations, adoptive members and members by marriage along with definition of family business corporation.

²⁵ *Supra*, footnote 11.

²⁶ *Supra*, footnote 5, paras. 22, 23 and 24.

Minister or the Chief Medical Officer of Health may apply to a judge of the Superior Court of Justice for an order,

(a) prohibiting the continuation or repetition of the contravention or the carrying on of any activity specified in the order that, in the opinion of the judge, will or will likely result in the continuation or repetition of the contravention by the person committing the contravention; and

(b) requiring the person committing the contravention to take any action that is, in the opinion of the judge, necessary or advisable for the purpose of reducing the likelihood of a continuation or repetition of the contravention. 2007, c. 10, Sched. F, s. 21.

[106] Section 101 of the *Courts of Justice Act*²⁷ (“CJA”) provides the court with the authority to grant an interlocutory injunction or mandatory order “where it appears to a judge of the court to be just or convenient to do so” on “such terms as are considered just”.

[107] The Director and the Municipalities are seeking a permanent injunction based on their respective statutes and pursuant to section 101 of the CJA.

i. Statutory Injunctions

Legal Principles

[108] The granting of a statutory injunction is a different analysis than the granting of an equitable injunction under the common law.²⁸ The test as described in *RJR-MacDonald Inc. v. Canada (Attorney General)*²⁹ which was repeated and confirmed by the Supreme Court of Canada in *Google Inc. v. Equustek Solutions Inc. et al*³⁰ is not applicable.

[109] Carole J. Brown J. in *The Law Society of Upper Canada v. Coulson*³¹ put it this way:

[6] The applicable test in determining whether a statutory injunction should issue is different from the test applicable to common law injunctions set forth in *RJR-MacDonald V. Canada (Attorney General)*, [1995] 3 S.C.C. 199. The applicable test is set forth at *R. v. IPSCO Recycling Inc.*, [2003] F.C.J. No. 1950 at paragraph 51. Among the applicable legal principles in determining whether to grant a statutory injunction, the Court observed in *R. v. IPSCO*, *supra*, that “the Court retains a discretion as to whether to grant conjunctive relief. Hardship from the

²⁷ RSO 1990, c. C.43.

²⁸ *Law Society of Upper Canada v. Coulson*, 2013 ONC 2448 (SCJ), para 6.

²⁹ [1994] 1 S.C.R. 311.

³⁰ 2017 SCC 34 (CanLII).

³¹ *Supra*, footnote 28.

imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed.”³²

- [110] The requirement of irreparable harm and balance of convenience as described in *RJR-MacDonald* is not applicable. Having said this, it does not translate that the court has no discretion on whether to grant the injunction requested. The court does maintain a residual discretion as to whether to grant the injunction even if there is a clear breach of the statute.³³
- [111] The residual discretion that the court maintains is limited. The court will only refuse an application for a statutory injunction from a municipality in “exceptional circumstances”.³⁴
- [112] The applicant need only to establish that there is a breach of the applicable statute. There is no obligation on the municipality to provide “compelling evidence.”³⁵
- [113] Once a breach of the statute has been established by the evidence provided, the court can only exercise its discretion to not grant the injunction in “exceptional circumstances” which could include: the offending party has ceased the activity; the injunction is moot and would serve no purpose; the offending party has provided clear and unequivocal evidence that the unlawful conduct will cease; where there is a right that pre-existed the enactment that was breached; there is uncertainty that the offending party is flouting the law or where the conduct is not what the enactment was intended to prevent.³⁶

Analysis

- [114] I have found that the respondent is in breach of sections 14(1) and 15(1) of the *Milk Act* and section 18 of the *HPPA*. The question to be answered is whether there exists “exceptional circumstances” in that the court should exercise its discretion to not grant the statutory injunction requested by the Director and the Municipalities.
- [115] The voluminous material provided by the respondents and the OFOF indicate that there is a high demand for the consumption of raw milk and raw milk products. The demand is based on cultural, health, life choices and religious reasons. All these reasons are laudable and legitimate.
- [116] The question however is whether any of these reasons fall within the meaning of “exceptional circumstances”. I find they do not.

³² Ibid, para. 6.

³³ *Peachland (District) v. Peachland Self Storage Ltd.*, 2011 BCCA 466 (CA), paras 27 and 28.

³⁴ *Newcastle Recycling Ltd. et al v. Clarington (Municipality) et al*, 2005 ONCA 46384 (CA) (CanLII), para 32.

³⁵ Ibid, paras. 31 and 32.

³⁶ *Vancouver (City) v. Claude Maurice*, 2002 BCSC 1421 (BCSC); *Vancouver (City) v. O’Flynn-Magee*, [2011] B.C.J. No. 2305 (BCSC); *British Columbia (Minister of Environment, Lands and Parks) v. Alpha Manufacturing Inc.*, [1997] B.C.J. No. 1989 (BCCA); Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2016) at 3.265.

- [117] There was no evidence provided that indicate that the respondents and OFOF will cease the delivery of raw milk and raw milk products. There was no evidence provided that indicate the issue on these applications are moot. On the contrary, the evidence clearly indicates that it is the intention and motivation of the respondents and the intervener to continue to produce raw milk, manufacture raw milk products and distribute the raw milk and raw milk products to the shareholders of OFOF. All these indicators leave the court with the inescapable conclusion that “exceptional circumstances” do not exist. The respondents and the intervener appreciate that they are producing and manufacturing raw milk and raw milk products. They are fully aware that doing so is in violation of the *Milk Act* and the *HPPA*. It is for the reason to attempt to comply with the two statutes that the farm co-operative was created and implemented.
- [118] Notwithstanding, the demand for raw milk and its products, the actions of the respondents and OFOF to distribute to non-family members raw milk and its products outside the confines of the family farm violates the *Milk Act* and the *HPPA*. Thus, the conclusion is evident. The actions of the respondents and OFOF are in contravention and are in repeated breach of the two statutes, the *Milk Act* and the *HPPA*. A permanent injunctive order, as requested by the Director and the Municipalities, is warranted.

ii. Injunction under the CJA

- [119] Given my conclusion that a permanent injunctive order is warranted under the provisions of the *Milk Act* and the *HPPA*, I need not determine if a similar order is justified under section 101 of the *CJA*. Hence, I make no finding on whether such an order can or should be granted under the *CJA*.

iii. Terms of the Injunctive Order

- [120] The Director and the Municipalities each request a permanent injunctive order but differ of the breadth of such an order. The Director simply requests an order restraining the respondents and all persons with knowledge of this order from operating a plant without a licence under the *Milk Act* along with an order restraining the respondents, ARC’s employees and all other persons from hindering or obstructing the inspection, by a field person or officer appointed by the Director under the *Milk Act*.
- [121] The Municipalities are requesting a far more expansive order. The Municipalities request a declaration that the respondents have contravened section 18 of the *HPPA* but also an order restraining the respondents and any and all persons having knowledge of the order from directly and indirectly, by any means whatsoever from a variety of activities including offering for sale, selling or distributing or counselling others to offer for sale, sell, deliver or distribute unpasteurized milk and their products, permitting use of their land to do so, threatening or intimidating the Municipalities’ employees and physically interfering with or counselling others to physically interfere with the performance of the Municipalities’ employees. The Municipalities support their request on the actions of some of the respondents, and specifically the conduct of interfering with the search

warrant on October 2, 2015 and the subsequent convictions of obstruction of a peace officer.

- [122] In addition, the Municipalities request an order that the premises of the Church be closed to any use in any way associated with the sale, offer to sale, distribution or delivery of raw milk or their products and authorizing the arrest by any police officer.
- [123] The granting of a permanent injunction is an exceptional remedy that should be granted in rare and limited circumstances. A court should not grant such an order unless the court is prepared if necessary to commit a violator of the order into prison.³⁷ As Robert J. Sharpe stated in his book:

...Like other injunctions, a statutory order should not be overly broad. It should be framed so as to clearly indicate what conduct is prohibited or commanded and should not just reproduce the general language of the statute. If the language of the statute is narrow, an injunction should correspond to and reflect the prohibitions contemplated in the statute and should not go beyond them.³⁸

- [124] In keeping these instructions in mind, I find the request by the Municipalities overly broad and do not confine themselves to the language of the statute.
- [125] I am also mindful of the submissions and beliefs of the respondents that they have and continue to be targeted by the Director and the Municipalities. It is their belief that they are being persecuted for their desire to consume unpasteurized milk and their products. The submission of Mark was duly compelling for this belief.
- [126] Though I can appreciate perspective of the respondents and that of Mark, until the law is found to be unconstitutional or is changed, the present law is the law and must be complied with or one risks prosecution and court action. This includes compliance with the investigative powers provided under the *Milk Act* and *HPPA*.
- [127] Having said this, the order that I intend to draft will be narrower in focus than that requested by the Municipalities and will specifically deal with the applicable provisions of the *Milk Act* and the *HPPA*, keeping in mind the “family farm exemption.”

³⁷ Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2016) at 3.265.

³⁸ *Ibid.*

Disposition³⁹

[128] I therefore make the following final order:

Under CV-16-125371-00

- (a) The respondents, any corporate entity and all persons with knowledge of this order are hereby restrained from operating a plant without a licence, in contravention of section 15(1) of the *Milk Act*.
- (b) The respondents, any employees of the respondents and all other persons with knowledge of this order are hereby restrained from hindering or obstructing the inspection, by a field person or officer appointed by the Director from exercising their powers to request, in respect of milk from cows or goats (milk) and their products, to produce the books, records and documents and permit inspections and furnish copies or extracts thereof and permit inspection of the premises and any equipment, milk or milk products therein.
- (c) Any person affected by this order may move to set aside or vary the terms of this order upon providing five clear days notice and any such motion or proceeding shall not in any way excuse that person or persons from compliance with the terms of this order.

Under CV-16-125250-00

- (d) A declaration that the respondents have contravened section 18 of the *HPPA* and its regulations by delivering and distributing unpasteurized milk and unpasteurized milk products.
- (e) The respondents and any and all persons having knowledge of this order are hereby restrained from directly or indirectly:
 - i. Selling, offering for sale, delivering or distributing milk or cream or products processed or derived from milk that has not been pasteurized or sterilized in a plant that is not licenced under the *Milk Act* and that is not exempt by the “family farm exemption”, as defined herein.
 - ii. Interfering, physically or otherwise, with the strict performance by the Municipalities or their employees, servants or agents acting in lawful execution of their specific and mandated powers, obligations and duties under the *HPPA*.

³⁹ I wish to acknowledge my appreciation to Dylan Baker and Allison Large, previous and present student at-law for the Court for their helpful assistance. Their assistance in the review and attendant legal research in their capacity as Law Clerks for the Court is acknowledged.

- (f) Any person affected by this order may move to set aside or vary the terms of this order upon providing five clear days notice, but such motion or proceeding shall not in any way excuse that person or persons from compliance with the terms of this order.

Costs

- (g) If the parties cannot agree on costs, then the Director and the Municipalities to serve and file their respective submissions for costs within thirty days from the date of this decision, and the respondents and the intervener will have thirty days thereafter to serve and file their submissions. There is no right for any reply submissions. The submissions to be no more than five pages, double spaced, exclusive of any bill of costs, case law and offers to settle. Submissions are to be filed with the court. If no submissions are received within the time period set out herein, an order will be made that there will be no costs.

Justice P.W. Sutherland

Released: January 5, 2018

CITATION: Canadian National Railway Company v. Doe, 2020 ONSC 4152
COURT FILE NO.: CV-20-00643150-0000
DATE: 20200703

SUPERIOR COURT OF JUSTICE - ONTARIO

B E T W E E N:

Canadian National Railway Company, Plaintiff

– and –

John Doe et al., Defendants

BEFORE: F.L. Myers J.

COUNSEL: *Marina E. Sampson, Andy Pushalik, and Meredith Bacal*
for the Plaintiff

HEARD: July 3, 2020

ENDORSEMENT

[1] On June 26, 2020, I granted CN's request for an injunction to prevent protesters from trespassing on or too near its Brampton Intermodal Hub facility and from blocking its trains. My endorsement of that day is reported at 2020 ONSC 3998.

[2] The order was made "*quia timet*" or in relation to imminently apprehended harm. There was no blockade of CN's trains that day. There had been a blockade two days previously and the evidence showed another blockade was expected on the 26th as discussed in my endorsement of that date.

[3] On June 26, 2020, CN did not provide notice to anyone in advance of attending court to seek its injunction. As the harm had not yet happened, there was no one who could be readily identified as being affected by the order sought to whom notice ought to have been given.

[4] Under Rule 40.02(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, an injunction made without notice to the person or people affected may not exceed ten days duration. The order made June 26, 2020 provided for CN to come back to court one week later i.e. today.

[5] CN attends today and seeks a thirty-day extension of the injunction. There is clear evidence of a significant protest having been organized for this weekend near CN's Brampton Intermodal Hub facility. There is once again a strong likelihood that the protesters will block CN's trains and trespass on its property. This is a well organized and advertised protest. One slogan used by some protesters expressly calls for protesters to "take the rails".

[6] I note that while I drew the same inference last week, the protesters did not trespass on CN's land nor block its trains. However, that was a more *impromptu* event. I do not take from that one evening a determination that the blockades are over.

[7] But, because no one actually trespassed or blockaded its trains last week, CN did not serve its injunction on anyone. It arrives at court today once again without notice to any defendants.

[8] Rule 40.02(2) provides that where an injunction is granted without notice, a motion to extend "may be made only on notice to every party affected by the order" unless the judge is satisfied that there are "exceptional circumstances". Rule 40.02(3) then provides that an extension may be granted without notice for an additional ten days.

[9] It appears from these rules that for CN to appear today to request an extension without serving anyone, it must establish "exceptional circumstances". Then it may seek an extension for up to another ten days.

[10] CN asks for an extension of 30 days. It is hesitant to serve its injunction if it does not need to do so. It does not want to inflame protesters unnecessarily. It does not want to keep using court time unnecessarily. Moreover, it argues that the fact that the protesters did not blockade CN's tracks last week shows that they can protest perfectly well without invading CN's rights, endangering it people, it business,

and protesters themselves. As Ms. Sampson says, we are not out of the woods yet. Thirty days will provide a cushion for everyone's safety.

[11] As attractive as that may be from a point of view of convenience, the balance here involves peoples' fundamental rights to express themselves, assemble, and protest. The law does not enjoin protesters to provide a cushion for safety just in case they might go too far.

[12] In *MacMillan Bloedel Ltd. v Simpson*, 1996 CanLII165 (SCC), McLachlin J., as she then was, wrote:

In a society the prizes both the right to express dissent and the maintenance of private rights, a way to reconcile both interests must be found. One of the ways this can be done is through court orders like the one at issue in this case. The task of the courts is to find a way to protect the legitimate exercise of lawful private rights while preserving maximum scope for the lawful exercise of the right of expression and protest.

[13] Injunctions are very serious orders. They put people at risk of being jailed for contempt of court. The law recognizes the need for people to have a say in whether they ought properly to be enjoined before being exposed to such serious risks especially when they are otherwise engaging in constitutionally protected behaviour.

[14] I recognize that there is no right to engage in protest on someone's private land as discussed last week. But I cannot prejudge, in a without notice hearing, all of the myriad of facts and nuances by which protesters' behaviour may manifest. To properly engage in the balancing required by the Supreme Court of Canada, I adopt the following statement of the British Columbia Court of Appeal in *Provincial Rental Housing Corporation v Hall*, 2005 BCCA 36 (CanLII) at para. [20]:

When no notice is given to protesters of an application for injunctive relief, it seems to me that even where extraordinary urgency can be made out by the applicant, the granting of a short, time-limited injunction would be a preferable form of order. Granting an injunction for a short period limits the risk of irreparable harm to the plaintiff while ensuring that notice can be given to the protesters and others who may be affected by the

order. Preparation of material and a contested hearing are then possible. Among other matters that can be heard at the contested hearing, submissions can then be directed at how the lawful exercise of the right of freedom of expression, which includes protest, is to be taken into account in weighing the balance of convenience and, if an interlocutory order is required, how freedom of expression can be minimally impaired.

[15] I am satisfied that the circumstances before the court are exceptional. 2020 is exceptional. We are in the midst of a global pandemic, a once-in-a-generation period of societal upheaval, widespread protests, and unprecedented fragility of the economy and social institutions including policing. CN did not jump the gun last week as its evidence of a serious threat of a breach of its rights was strong. It cannot be faulted for not serving its injunction in the circumstances. The harm could have easily outweighed the good achieved by doing so. The evidence today of the imminence of harm is as strong as or stronger than last week in light of the extra organization of the upcoming protests. The risk of harm CN and to people standing on railway tracks in front of moving trains is serious and real. It has been a frequent occurrence in protests in Canada this year (and as recently as last week).

[16] In all, for the reasons given in last week's endorsement and in my February endorsement incorporated in last week's endorsement, I find that the three-part test for interlocutory injunctions and imminence of harm are all made out. As the order should impair peoples' rights as little as possible and those who might become affected need to be able to have their say quickly on the basis that it will be CN's burden to continue the order rather than a protester's burden to move to set it aside, I limit the continuation of the order dated June 26, 2020 to ten days and schedule a further hearing, on notice, on July 13, 2020 at 2:00 pm by Zoom.

[17] If CN does not need to serve its order because protesters are not trespassing despite the threat to do so, I am dubious of the ongoing need for injunctive relief.

[18] The terms set out in schedule "A" apply to the order signed.

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[19] Finally, I must commend the plaintiff's counsel on their presentation and their written materials. Counsel's forthright disclosure of facts and case law that could be argued against their position exemplified the highest standards of professionalism.

F.L. Myers J.

Date: July 3, 2020

SCHEDULE "A"
TERMS INCORPORATED INTO ORDERS

1. Upon the courthouse reopening to the public, each party shall file with the Civil Motions Office a copy of all the material he, she, or it delivered electronically for this proceeding, with proof of service, and pay the appropriate fees therefor.
2. Notwithstanding Rule 59.05, this Order is effective from the date it is made and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Order need be entered and filed unless appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Order may nonetheless submit a formal Order for original signing, entry and filing when the Court returns to regular operations.

**AUTOMOTIVE PARTS
MANUFACTURERS'
ASSOCIATION**
Plaintiff

- and -

JIM BOAK et al
Defendants

- and -

Court File No.: CV-22-00030791-0000
**THE CORPORATION OF THE
CITY OF WINDSOR et al** E643
Intervenors

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT WINDSOR

**SUPPLEMENTAL BOOK OF
AUTHORITIES OF THE INTERVENOR,
THE CORPORATION OF THE CITY OF
WINDSOR**

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